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Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

Melvin E. Blough,

Petitioner

v.

United States of America,
Supreme Court of the United States,
William H. Rehnquist, Chief Justice of the Supreme Court, United States Court of Appeals for the Eleventh Circuit, United States District Court Middle District of Florida Tampa Division,

Respondent(s)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IN THE ABSENCE OF JUDICIAL PROFILING BY THE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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106 pp

QUESTIONS PRESENTED

On January 25, 1970 citizens Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer were secure in those constitutional guarantees made possible by Americans called upon to die or become disabled for those same guarantees.

On January 25, 1970 Petitioner (hereafter "Blough") was lying on a jungle trail in Vietnam. Blough was having difficulty breathing in that he had been hit with a rocket propelled grenade and his left lung had collapsed, his legs had been blown off, his left hand all but severed at the wrist, and a portion of his intestines were lying on his chest.

Chief Judge Kovachevich of the defendant District Court did review the administrative record and affirm the factual assertion that Blough (a totally disabled veteran) was repeatedly and intentionally deprived procedural due process by the defendant Courts in a 1998/2000 claim of constitutional tort against defendant Government. The defendant Court of Appeals has ruled that the defendant Courts have no constitutional liability for the systemic deprivation of that specific procedural due process to which defendant Government and defendant Court of Appeals accept as true.

This Court is called upon to resolve the conflict between the constitutional obligation which inured to Blough on January 25, 1970 and the claim of immunity for judicial abuse by the defendant Courts.

1. Did the war powers clause of the Constitution create a constitutional obligation to totally disabled veterans guaranteeing due process of law in complaints of unconstitutional taking by the Federal Judiciary ?

2. Did the intentional and systemic denial of Fifth Amendment procedural due process rights by the Federal Judiciary, in concert with the constitutional guarantee presented in question number one, provide a constitutional exception to the doctrine of sovereign immunity in a complaint of constitutional limitation directed to the Federal Judiciary ?

TABLE OF CONTENTS

	Page (s)
QUESTIONS PRESENTED	i - ii
TABLE OF CONTENTS	iii-v
TABLE OF AUTHORITIES	vi-ix
TEXT OF PETITION FOR WRIT OF CERTIORARI:	
A. Opinion Below	1
B. Jurisdiction	1
C. Constitutional Provisions, Public Laws/Statutes, Rules	1-2
D. Statement of Case and Facts Material to Questions Presented	2-4
E. Reasons For Granting The Petition:	
1. Recognition of a constitutional obligation to totally disabled veterans guaranteeing due process of law in complaints of unconstitutional taking by the Federal Judiciary.	4-9
2. Recognition of a specific application of the constitutional exception to the doctrine of sovereign immunity:	
a) Constitutionally protected interest.	9-11

b) Deprivation of the constitutionally protected interest by the defendant Courts. 11-17

c) Constitutional inadequacy of those procedures accompanying the deprivation of the constitutionally protected interest. 17-24

CONCLUSION 25

APPENDICIES:

Final judgment United States Court of Appeals for the Eleventh Circuit. App. at 1-3

U.S. Constitution, article 1, section 8, clause 11, 12. App. at 4

U.S. Constitution, article 3, section 2, clause 1. App. at 4

U.S. Constitution amendment V App. at 4

Public Law 85-857 (Veterans Benefits) App. at 5

Title 28 U.S.C. sections:

1254(1) App. at 5
1291 App. at 6
1331 App. at 6

Rules of the United States Supreme Court:

Rule 10(a) App. at 6

Complaint with Demand for Jury Trial App. at 7-34

Motion for Reassignment of Case App. at 35-36

Order by Chief Judge United States District Court Middle District of Florida Tampa Division Reassigning Case App. at 37-38

Amendment to Complaint App. at 39-43

Order by the United States District Court for the Middle District of Florida Tampa Division Dismissing Cause App. at 44-45

Brief for appellant App. at 46-83

Brief for appellees App. at 84-104

Reply brief for appellant App. at 105-118

Motion for judgment App. at 119-124

Denial motion for judgment App. at 125

Denial petition for hearing en banc App. at 126-127

Proof of Status as Totally and Permanently Disabled Veteran App. at 128-129

TABLE OF AUTHORITIES

CASES	Page (s)
Armstrong v. Manzo, 380 U.S. 545, 550 (1965)	10
Arver v. United States, 245 U.S. 366 (1918)	6, 8
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	24
Barbon v. The Mayor and City Council of Baltimore, Peters 7, 243, 247 (1833)	8
Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)	10
Boddie v. Connecticut, 401 U.S. 371, 378 (1971)	10
Cafeteria & Restaurant Workers Union, etc. v. McElroy, 367 U.S. 886, 895 (1961)	9
Cooper v. Pate, 378 U.S. 546 (1964)	3, 12
Daniels v. Williams, 474 U.S. 327 (1986)	12, 13
Estelle v. Gamble, 429 U.S. 97, 99 (1976)	3, 12
Ex parte Quirin, 317 U.S. 1, 26 (1942).	18

Fuentes v. Shevin,
407 U.S. 67 (1972) 19

Goldberg v. Kelly,
397 U.S. 254, 263 (1970) 10

Hovey v. Elliott,
167 U.S. 409 (1897) 11

Larson v. Domestic & Foreign
Commerce Corporation,
337 U.S. 682 (1949) 2, 18, 22

Lehr v. Robertson,
463 U.S. 248 (1983) 10

Marbury v. Madison,
5 U.S. (1 Cranch) (1803) 24

Mississippi v. Johnson,
4 Wall. 475 (1866) 24

Monell v. New York City Dept.
of Social Services,
436 U.S. 691 (1978) 19

Monongahela Navigation Co. v.
United States,
148 U.S. 312 (1893) 6

Mullane v. Central Hanover Bank
and Trust Co.,
339 U.S. 306, 313 (1950) 10, 11

Oklahoma City v. Tuttle,
471 U.S. 823 (1985) 20

Owen v. City of Independence, Mo.
445 U.S. 651 (1980) 20

Palko v. State of Connecticut,
302 U.S. 319, 327 (1937) 15

Parham v. J.R.,
442 U.S. 584, 608 (1979) 10

Pembaur v. City of Cincinnati,
475 U.S. 469 (1986) 20

Railroad Retirement Board v.
Alton R. Co.,
295 U.S. 330, 347 (1935) 2, 18

Rescue Army v. Municipal Court,
331 U.S. 549 (1947) 24

Spector Motor Service, Inc. v.
McLaughlin, 323 U.S. 101 24

United States v. Lee,
106 U.S. 196 (1882) 2, 5, 15, 18, 23

Washington v. Glucksberg,
521 U.S. 702, 720 (1997) 8, 14

Yick Wo v. Hopkins,
118 U.S. 356, 370 (1886) 18

CONSTITUTIONAL PROVISIONS:

U.S. Constitution, article 1, section 8,
clause 11, 12. 1, 5

U.S. Constitution, article 3, section 2,
clause 1. 1, 5

U.S. Constitution amendment V 1, 13, 14, 25

PUBLIC LAWS/STATUTES:

Public Law 85-857 (Veterans Benefits)		2, 5
Title 28 U.S.C. sections:		
	1254(1)	1, 2
	1291	1, 2
	1331	1, 2

RULES:

Rules of the United States Supreme Court:		
	Rule 10(a)	2, 4

OTHER REFERENCES:

The Congressional Globe, March 3, 1865.	7

OPINIONS BELOW

The final decision of the United States Court of Appeals for the Eleventh Circuit is unreported (App. at A1-3).

JURISDICTION

Federal jurisdiction (Title 28 U.S.C. section 1331) over the subject matter of this complaint (App. at A7-34) arose under Article I. (Section 8, cl. 11, 12) and Article III. (Section 2, cl. 1) of the United States Constitution in concert with the Fifth Amendment to the Constitution.

An appeal from the final Order by the United States District Court for the Middle District of Florida (App. at A44-45) was timely filed to the United States Court of Appeals for the Eleventh Circuit with jurisdiction under Title 28 U.S.C. section 1291.

On November 21, 2002 a final judgment was entered by the United States Court of Appeals for the Eleventh Circuit permitting Plaintiff-Appellant-Petitioner (hereafter Blough) to petition the United States Supreme Court for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit under the provisions of Title 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Those Constitutional provisions involved are the War Powers Clause (art. 1, section 8, cl. 11, 12); the Jurisdiction of Courts Clause (art 3, section 2, cl. 1); and the Fifth Amendment to the United States Constitution. The public laws and statutes involved are Public Law 85-857 (Veterans Benefits); Title 28

U.S.C. Judiciary and Judicial Procedure sections 1254(1), 1291, 1331. Rule 10(a) the United States Supreme Court. All constitutional provisions, statutes and rules involved appear in the App. at A4-6.

STATEMENT OF CASE AND FACTS MATERIAL TO CONSIDERATION OF QUESTIONS PRESENTED:

The Fifth Amendment does place constitutional limitations upon the judicial power of the Defendants-Appellees-Respondents (hereafter "defendant Courts") in that no person shall be deprived of life, liberty, or property without due process of law. The limitation was recognized in *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 347 (1935) and the deprivation was recognized as an unconstitutional taking by the sovereign government in *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949).

"Under our system (of government) the people are the sovereign". *United States v. Lee*, 106 U.S. 196 (1882). The Federal Judiciary has viewed the *Larson*, supra, "constitutional exception" to sovereign immunity as an anomaly and imputed to the common law an absolute immunity from suit. Under the public policy rationale presented in *Lee*, supra, the sovereign may not be subject to suit without its consent.

This case addresses the conflict between a specific constitutional obligation of the American people (the sovereign) to America's one hundred seventy thousand totally disabled veterans (question number one) and a claim of sovereign immunity by the Federal Judiciary which accepts as true the allegation of systemic and intentional violation of that specific constitutional obligation (question number two).

Blough, as a totally disabled veteran, did previously complain to the defendant Courts of threats of physical injury by the defendant Government (Federal cause of action for damages as Fifth Amendment liberty interest violation) and the response by the defendant Courts (as the Constitutional guardian of due process under Article III. Section 2, clause 1) was to systemically and intentionally deprive Blough of his Fifth Amendment right to procedural due process (App. at 14-34, 58-82, 109-117, 122-124). This complaint of constitutional limitation is directed to an unconstitutional taking by the defendant Courts in the prior litigation.

The defendant Government's motion to dismiss for failure to state a claim on which relief could be granted (i.e. deferring to defendant Government's claim to sovereign immunity) required the defendant Appellate Court to take as true the allegations within the instant complaint, *Cooper v. Pate*, 378 U.S. 546 (1964); *Estelle v. Gamble*, 429 U.S. 97, 99 (1976). The defendant Government (App. at A84-104) and defendant Court of Appeals (App. at A1-3) have entered pleas of sovereign immunity to the allegations of unconstitutional taking within the complaint. The question at this stage is not what Blough may be able to prove, but whether Blough have shown a ground for relief if he can prove what he alleges.

Question number one invites the United States Supreme Court to recognize a constitutional obligation guaranteeing a specific right to those totally disabled veterans whose lives have been most adversely affected by the power of the public to compel military service as the common defence requires. Question number two addresses the constitutional liability of the Federal Judiciary when said constitutional guarantee is systemically and intentionally denied by

the Federal Judiciary. The importance of the constitutional rights of totally disabled veterans and the alleged unconstitutional taking by the lower Courts are compelling reasons for the Supreme Court to exercise its supervisory authority over the defendant district Court and defendant appellate Court as provided under U.S.Sup.Ct.R. 10(a).

What is the purpose to which Blough petitions this Court for a third time (prior case numbers 01-203 and 01-1798)? Fifty eight thousand Americans died in Vietnam and eighty thousand came home totally disabled. Thousands of Americans fled the country to avoid the draft and were granted amnesty such that they could enjoy those constitutional guarantees lost by those killed in Vietnam. Those Americans seriously wounded in Vietnam have come to cherish the importance of those constitutional guarantees for which they paid dearly and are constantly reminded of their sacrifice as "phantom pains" (in what remains of amputated limbs) grab them, shake them, and make them remember. It was for the purpose of receiving those constitutional guarantees that Americans went to war and were killed or disabled. It is the purpose for which Blough appeals to this Court.

REASONS FOR GRANTING THE PETITION

This appeal warrants acceptance and consideration in matters of constitutional law and principles of a democratic society to which the Supreme Court has final jurisdiction:

1. **Recognition of a constitutional obligation to totally disabled veterans guaranteeing due process of law in complaints of unconstitutional taking by the Federal Judiciary.**

The "national debt" is not measured in dollars, but rather in the number of lives lost and lives crippled in service to America by it's veterans. With the exception of the memorial obligation to those who lost their lives in service to their country; the American people have no greater debt than to the totally disabled veterans.

"Under our system (of government) the people are the sovereign". *United States v. Lee,* supra. No continuing relation between the sovereign and a citizen is more distinctively federal in character than that between it and the totally disabled veteran. The scope, nature, implied contracts and reciprocal obligations of the relation are derived from the constitution, are governed by federal authority, and have been the subject of Congressional recognition since the inception of the Republic. The United States Government has the exclusive power to establish and define the relation by virtue of its military and other powers including the powers of Congress to 'provide for the common Defence,' 'To declare War,' 'raise and support Armies,' (U.S. Const., Art. I, section 8); the powers of the President as Commander in Chief (U.S. Const., Art. II, section 2); the powers of the Federal Judiciary in all cases in law arising under the Constitution in controversies to which the United States shall be a party (U.S. Const., Art. III, section 2). The determination by the United States Government as to status as a totally disabled veteran is provided under P.L. 85-857.

Compulsory Service-Power of Congress:

> "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need; and the

right to compel it. Vattel, Law of Nations, book III, cc 1 and 2. In fact the duty of the citizen to render military services and the power to compel him against his consent to do so was expressly sanctioned by the Constitution of at least nine of the states, an illustration being afforded by the following provision of the Pennsylvania Constitution of 1776:

'That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportion toward the expense of that protection, and yield his personal service when necessary, or an equivalent thereof.' Article 8 (Thorpe, American Charters, Constitutions and Organic Laws, vol. 5, pp3081, 3083)." *Arver v. United States,* 245 U.S. 366 (1918).

The "power of the public" to compel military service as the common defence requires does impose upon the citizen a constitutional "taking" by the sovereign which is subject to the principle of *natural equity* presented in *Monongahela Navigation Co. v. United States*, 148 U.S. 312, (1893). *Natural equity* prevents the public from loading upon totally disabled veterans more than their just share of the burdens of government (war) and says that when they surrender to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to them.

The following statement was presented by the Speaker of the House of Representatives at the end of America's bloodiest war and applies to all Americans pursuant to the power of Congress to declare war:

"But, in this hour of gladness I cannot forget the obligations, paramount and undying, we owe to our heroic defenders on every battle-field upon the land, and every wave-rocked monitor and frigate upon the sea . ..... As we look from this Capital Hill over the nation there are crushed and broken hearts in every hamlet; there are wounded soldiers, mangled with rebel bullets, in every hospital; there are patriot graves in every church -yard; there are bleaching bones on every battle -field. It is the lofty and unfaltering heroism of the honored living, and the even more honored dead, that has taken us from every valley of disaster and defeat and placed our feet on the sun-crowned heights of victory. The granite shaft may commemorate their deeds. Our American Valhalla may be crowded with statues of our heroes. But our debt of gratitude to them can never be paid while time shall last and the history of a rescued nation shall endure." The Congressional Globe, page 1424, March 3, 1865.

The exercise of war powers by the sovereign Government did impose substantial pain and sacrifice upon the lives and liberties of totally disabled veterans which remains with them for the remainder of their lives; as does the continuing relation to the sovereign government and the private debt of the American people.

Representative Ingersoll was correct in that "you cannot pay for blood. The hero-patriot's blood is above all price" (The Congressional Globe, page 1420, March 3, 1865). What then is the constitutionally based *natural equity* to be returned to those Americans who became totally disabled pursuant to the "power of the public" to compel military service as the common defence requires ? Based upon the

principle of *reciprocity* as presented in *Arver,* supra; the*natural equity* is properly recognized as that constitutional obligation to totally disabled veterans guaranteeing those rights within the United States Constitution. The constitutional guarantees to totally disabled veterans extend beyond those acquired in being born or naturalized as Americans and are the natural equity (constitutional obligation) resulting from pain and sacrifice under the war powers clause of the constitution. Americans don't go to war for motherhood, apple pie, or baseball; but rather for the guarantees under the United States Constitution

The Supreme Court is not called upon to venture into unchartered waters and recognize a fundamental right under the substantive-due-process analysis presented in *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); however is called upon to recognize an obligation of the constitution guaranteeing an existing right specific to the status of America's one hundred seventy thousand totally disabled veterans. The principles of *reciprocity* and *natural equity* require that totally disabled veterans be guaranteed the right to due process of law in complaints of unconstitutional taking by that sovereign government which placed them in harms way upon the war powers clause of the constitution.

The Constitution was ordained and established by the people of the United States; and the government framed, as the people supposed best adapted to their situation and best calculated to promote their interests. *Barbon v. The Mayor and City Council of Baltimore*, Peters 7, 243, 247 (1833). A constitutionally ordained public interest has been central to those petitions granted certiorari by this Court (affirmative action, school prayer, right to abortion, etc.). The public interest exists at the

expense of the public debt to those Americans who have died or become totally disabled since the battles of Lexington and Concord. The constitutionally born principles of *reciprocity* and *natural equity* to America's totally disabled veterans are fundamental to our democracy and may not be abused by the defendant Courts. The Supreme Court has the constitutional responsibility to address the constitutional relationship between the sovereign government and totally disabled veterans.

2. **Recognition of a specific application of the constitutional exception to the doctrine of sovereign immunity.**

CONSTITUTIONALLY PROTECTED INTEREST

The following cause of action was presented in the instant complaint (App. at A9-10) and brief for appellant (App. at A62-63):

> "This cause of action addresses the *special* right of totally and permanently disabled veterans to appear and be heard by the Courts in complaints of threats of physical injury by the Government. It is difficult to imagine a claim more deserving of the Fifth Amendment right to procedural due process. It is unconscionable that the Government, in the capacity of the named defendants', has summarily deprived a totally and permanently disabled veteran of the right to procedural due process in a Federal cause of action."

That process which is constitutionally due cannot be divorced from the nature of the private interest that has been affected by the governments interest in summary adjudication. *Cafeteria & Restaurant*

Workers Union, etc. v. McElroy, 367 U.S. 886, 895 (1961); *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Parham v. J.R.*, 442 U.S. 584, 608 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983).

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that the deprivation of life, liberty or property by adjudication be proceeded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

> "Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. What the Constitution does require is 'an *opportunity* * * * granted at a meaningful time and in a meaningful manner,' *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965), 'for [a]hearing appropriate to the nature of the case. In short, ' within the limits of practicability,' a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (citing *Mullane v. Central Hanover Bank & Trust Co*, supra).

The nature of Blough's substantive private interest did provide a cause of action for damages to which the defendant Courts were constitutionally required to provide due process of law beginning with the initial 1998 suit. In *Mullane v. Central Hanover Bank & Trust Co*, supra, the Court held that a cause of action for damages is a property right, and thus cannot be taken without due process of law.

The Fifth Amendment does place constitutional limitations upon the judicial power of the defendant Courts in that no person shall be deprived of life, liberty, or property without due process of law. The substantive interest summarily denied by the defendant Courts (liberty interest of totally disabled veterans complaining of threats of physical injury by the Government) was taken by adjudication without due process of law in that Blough was denied the requisite opportunity to be heard. "The fundamental requisite of due process of law is the opportunity to be heard.'" *Mulane v. Central Hanover Bank & Trust Co.*, supra, (citing *Grannis v. Ordean*, 234 U.S. 385, 394). The discussion now turns to the unconstitutional taking by the defendant Courts in the denial of Blough's opportunity to be heard in the cause of action for constitutional tort.

DEPRIVATION OF THE CONSTITUTIONALLY PROTECTED INTEREST BY THE DEFENDANT COURTS

The summary judgment by the United States Court of Appeals for the Eleventh Circuit (App. at A1-3) is the seventh in a continuous series of unpublished rulings by the defendant Courts providing an unconstitutional taking "against a party without hearing him, or giving him an opportunity to be heard, (and) is (therefore) not a judicial determination of his rights, and is not entitled to respect in any other tribunal". *Hovey v. Elliott*, 167 U.S. 409 (1897). The comments by the defendant Court of Appeals reflect the pleadings of a defendant, as opposed to a judicial determination.

The defendant Government's motion to dismiss for failure to state a claim on which relief could be granted (i.e. deferring to defendant Government's

claim to sovereign immunity) required the defendant Appellate Court to take as true the allegations of the complaint, *Cooper v. Pate*, 378 U.S. 546 (1964); *Estelle v. Gamble*, 429 U.S. 97, 99 (1976). The defendant Government (App. at A84-108) and defendant Court of Appeals (App. at A1-3) have entered pleas of sovereign immunity to the allegations of unconstitutional taking within the complaint.

> "Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property. This history reflects the traditional and common-sense notion that the Due Process Clause was intended to secure the individual from the arbitrary exercise of the powers of government. The touchstone of due process is protection of the individual against arbitrary action of government. By requiring the government to follow appropriate procedures when its agents decide to deprive any person of life, liberty, or property, the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, it serves to prevent governmental power from being used for purposes of oppression. The difference between one end of the spectrum -negligence-and the other-intent-is abundantly clear." *Daniels v. Williams*, 474 U.S. 327 (1986).

The allegations and factual representations of unconstitutional taking by the defendant Courts in the prior litigation are detailed within the complaint (App. at A14-34) and must be taken as true by this Court. *Cooper v. Pate*, supra, *Estelle v. Gamble*, supra. The Fifth Amendment does place constitutional limitations upon the defendant Courts in that no person shall be deprived of life, liberty, or

property without due process of law. The allegations support a conclusion that the substantive interest summarily denied by the defendant Courts in the prior litigation (liberty interest of totally disabled veterans complaining of threats of physical injury by the Government) was taken by adjudication without due process of law in that Blough was denied the requisite opportunity to be heard.

The denial of Fifth Amendment procedural due process did occur through the following intentional actions and inactions by the defendant Courts: violation of established court procedures and precedents, false statements and misrepresentations, deliberate indifference, judicial abstention, unconstitutional refusal to address the claim of constitutional tort and the question of immunity for judicial abuse, and collusion among the defendants. A fair reading of the complaint provides confirmation that the *Daniels v. Williams*, supra, standards for deliberate and intentional denial of Blough's constitutional rights were met. The following example is representative of the alleged unconstitutional taking by the defendant Courts:

> The following allegation did appear in the initial complaint of June 29, 1998 (App. at A-21, S.Ct. case 01-203 at A37):
>
> "The United States Government Department of the Treasury (Defendant/employer) has engaged in the unlawful and unconscionable employment practice of threatening physical injury to a disabled veteran (Plaintiff/employee) and continues said practice in retaliating against the Plaintiff/employee for filing a discrimination complaint with the U.S. Equal Employment Opportunity Commission (EEOC)."

Blough's claim to violation of a protected Fifth Amendment liberty interest was asserted at a hearing before the defendant district Court at an early stage of the initial proceeding. The following statement was supported with documentation of Blough's status as a physically disabled veteran, third-party confirmation (EEOC) of the physical threats against Blough, and the substantive due -process-analysis presented in *Washington v. Glucksberg*, supra. (App. at A-21; S.Ct. case 01 -203 at B13, B19-20, C140-141):

"MR. BLOUGH: My basis for claim is that they violated my Fifth Amendment right to liberty. And that's -- I think that the Supreme Court, by the analysis in a recent case, would uphold that. There's a tradition in this country, and you don't do certain things. And one of the things you don't do is you don't tell a disabled veteran with two artificial legs you are going to push him down a flight of stairs. You have taken away my sense of security. You don't have that right to do that. Nobody has that right. And that's all."

Blough did timely file a motion to amend the initial complaint to add a Fifth Amendment claim of constitutional tort by the defendant Government, with memorandum of law in support (App.at A-22, A-25, S.Ct. case 01-203 at B29 -31, B40-45). The defendant Government filed a motion in opposition (App.at A-25, S.Ct. case 01 -203 at B33-37). Blough's timely filed amendment did reference Blough's status as a physically disabled veteran, the substantive due-process -analysis presented in *Washington v. Glucksberg*, supra, and the constitutional exception to sovereign immunity presented in *United States v. Lee*, supra.

The Orders of the defendant district Court and defendant appellate Court in the initial litigation did judicially involve, however failed to adjudicate the cause of action for constitutional tort and therefore no final order was issued on the merits of Blough's claim of constitutional tort (App. A24 -27, S.Ct. case 01-203 at A14-15, A20-26). The judicial conduct of the Courts in the initial litigation was deliberately indifferent to Blough's Fifth Amendment procedural due process rights (App. at 15).

The absence of procedural due process in Blough's initial complaint of constitutional tort was merely a prelude to that pretense for justice which the Supreme Court cautioned against in *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) as the defendant Courts did unconstitutionally created "other grounds" for dismissal to avoid addressing Blough's complaint of constitutional tort in a total of six rulings prior to this appeal.

The defendant Courts unconstitutional taking of Blough's procedural due process rights in his claim of constitutional tort became overtly intentional in the subsequent complaint as Blough returned to the defendant district Court and filed a second Fifth Amendment complaint of constitutional tort against the defendant Government alleging the same cause of action for constitutional rights violations to which the courts had unconstitutionally refused to litigate in the initial litigation (App. A15-18, A28-33, S.Ct. case 01-203 at 20-27, A1-3, A9-13, C1-49). The defendant Government, defendant district Court, and defendant appellate Court did **falsely state** that no amendment was filed in the initial litigation and summarily dismissed Blough's

subsequent complaint as *res judicata* by intentionally ignoring Blough's amendment and defendant Government's response which were plainly within the court record of the initial and subsequent complaints (defendant district Court case numbers 8:98-CIV-1358-T-24, 8:00-CIV -1631-T-26, defendant appellate Court case numbers 99-13735, 00-16546).

The soundness of the decisions and the purity of the motives of the defendant district Court and defendant appellate Court in the prior litigation were subsequently brought into question by a factual review of the same case files by the Chief Judge of the defendant district Court at an early stage of the current litigation.

Blough did, upon filing of the instant complaint, Motion the Chief Judge for the defendant district Court to reassign the case to a trial judge not involved in the prior litigation in that the instant complaint is based upon **allegations of deliberate and intentional denial of due process by the Courts** (App. A35-36).

The Order by the Chief Judge for the district court, in response to Blough's Motion, states that "the undersigned **has reviewed the three cases filed in this court by the plaintiff, the instant case, Blough v. Rubin, Case No. 8:98-CIV-1358-T-24, Blough v. Department of the Treasury, Case No. 8:00-CIV-1631-T-26, and finds the plaintiff's request to be well-taken."** (App. A37-38). Chief Judge Kovachevich of the defendant district Court is to be commended for her honesty and courage.

The unconstitutional taking did not end with the prior litigation as the defendant district Court in the

current litigation dismissed the instant complaint *sua sponte* under Public Law 104-134 (Prison Litigation Reform Act of 1995). The complaint is void of any suggestion or documentation that Blough was a "prisoner" or was proceeding *in forma pauperis* under local rule 4.07 of the district court. The summary dispositions by the defendant district Court have been consistent and intentional with the purpose of punishing Blough for exercising his constitutional right to complain of unconstitutional taking by the defendant Courts.

The defendant Courts have, since the initial complaint was filed in 1998; unconstitutionally provided that no "opportunity" is due to Blough's claim of constitutional tort against defendant Government. As in the case of *United States v. Lee,* supra; the defense for unconstitutional taking by the defendant Courts rests solely upon the claim of sovereign immunity to the Federal Judiciary; however clear it is that the United States Constitution prohibits the Federal Judiciary from intentionally depriving any person of life, liberty, or property by adjudication without the requisite "opportunity" to due process of law.

Blough made seven affirmative allegations of constitutional limitations upon the Courts' powers and made claim that the Courts' actions amounted to an unconstitutional taking (App. at A14-17, 39-43, 73-77). The discussion now turns to whether the defendant Courts may claim the immunity of the sovereign if Blough can prove the allegations of unconstitutional taking by the defendant Courts.

CONSTITUTIONAL INADEQUACY OF THOSE PROCEDURES ACCOMPANYING THE DEPRIVATION OF THE CONSTITUTIONALLY PROTECTED INTEREST

"Under our system (of government) the people are the sovereign". *United States v. Lee,* supra. "Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom government exists and acts. And the law is the definition and limitation of power." *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Consistent with *Lee* and *Yick Wo;* this Court has held that the Federal Judiciary possesses no power not derived from the Constitution, *Ex Parte Quirin*, 317 U.S. 1, 26, (1942); those constitutional powers conferred upon the Federal Judiciary must be exercised subject to the guarantee of due process of law found in the Fifth Amendment, *Railroad Retirement Board v. Alton R. Co.*, supra; the sovereign immunity to the Federal Judiciary rests upon reasons of public policy, *United States v. Lee*, supra; and an unconstitutional taking by the sovereign, of that which is guaranteed by the Constitution, provides a constitutional exception to the doctrine of sovereign immunity, *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949), referring to the *Lee* case.

"The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simple mistaken

deprivations of property interests can be prevented. But no latter hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not ... embraced the general proposition that a wrong may be done if it can be undone.'" *Fuentes v. Shevin,* 407 U.S. 67 (1972), (citing *Stanley v. Illinois*, 405 U.S. 645, 647).

"'Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.' *Monell v. New York City Dept. of Social Services*, 436 U.S. at 691. *Monell* is a case about responsibility. The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality'-that is, acts which the municipality has officially sanctioned or ordered. *Monell's* language makes clear that it expressly envisioned other officials 'whose acts or edicts may fairly be said to represent official policy,' *Monell, supra*, 436 U.S., at 694. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood. More importantly, where action is directed by those who establish govern[illegible]nt policy, the municipality is equally responsible whether that action is to be taken once or to be taken repeatedly. Municipal liability attaches only where

the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. We hold that municipal liability under section 1983 attaches where-and only where-a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. See *Oklahoma City v. Tuttle,* 471 U.S. at 823 ('policy' generally implies a course of action consciously chosen from among various alternatives')." *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986).

The decisions by this Court in *Monell, Oklahoma City,* and *Pembaur,* supra, were directed to municipal responsibility for constitutional tort; however the inherent truth of the following statement in *Owen v. City of Independence, Mo.*, 445 U.S. at 651 (1980) reflects back upon the constitutional requirement of the sovereign government to observe the *Fuentes* duty to follow a fair process of decision making when it acts to constitutional deprive:

> "How 'uniquely amiss' it would be, therefore, if the government itself-'the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct' – were permitted to disavow liability for the injury it has begotten."

Defendant Government and defendant appellate Court have; since the initial complaint of June 29, 1998, attempted to recast Blough's complaint as a

Bivens action. Blough's allegations have consistently alleged unconstitutional taking by the sovereign government and rejected the transfer of responsibility to employees of the sovereign acting within their authority. The decision making process afforded to Blough's claim of constitutional tort has required Blough to petition the defendant district Court in three separate complaints; involving three United States Attorneys, seven assistant United States Attorneys, four judges of the defendant district Court, eighteen judges providing en banc consideration to three appeals at the defendant appellate Court, nine justices of the Supreme Court, and an unknown number of law clerks. The employees of the sovereign did act with consistence in the unconstitutional taking (with the lone exception of the Chief Judge for the defendant district Court) and did collectively possess final decision making authority. Liability does not attach to the individual justices, law clerks or attorneys; as the judicial abuse did occur over an extended period, involved a substantial number of individuals with independent status, and was of such continuity as to constitute a systemic action of the sovereign. The sum of the parts equals the whole and responsibility rests with the defendant Courts for the intentional and systemic unconstitutional taking of Blough's substantive and procedural due process rights. The Order of March 1, 2002 by the Chief Judge for the district court (App. A39-40) stands in sharp contrast to the systemic judicial abuse by the defendant Courts.

The defendant Courts were Blough's constitutional due process decision makers and made a deliberate choice to follow a specific course of action among alternatives. The procedures fell short of constitutional guarantees in that the defendant Courts were made aware of the unconstitutional

taking and chose to continue the taking. This is not a question of the statutory authority of the individual judges or governmental attorneys; but rather the constitutional responsibility of the defendant Courts for the systemic unconstitutional taking. The judicial system which intentionally denied Blough constitutional access, did thereby deny his asserted constitutional rights by adjudication without the requisite "opportunity" to due process of law.

The instant complaint is a claim of constitutional limitation directed to the unconstitutional taking of Blough's constitutional right to procedural due process by the defendant Courts. Interference with the actions of the defendant Courts is warranted in that the defendant Courts have committed the wrong. In the case at point, Blough's constitutional guarantees were created by actions of the sovereign government under the war powers clause of the constitution. The sovereign government may not seek immunity from unconstitutionally taking an obligation of its own making. "Budgetary constraints, heavy caseloads, or other unknown factors do not excuse the Courts' to violate the constitutional rights of a totally disabled veteran" (App. at A112).

As in the case of *United States v. Lee,* supra; the defense for unconstitutional taking by the defendant Courts rests solely upon the claim of sovereign immunity to the Federal Judiciary; however clear it is that the United States Constitution prohibits the Federal Judiciary from intentionally depriving any person of life, liberty, or property by adjudication without the requisite "opportunity" to due process of law. Liability rests with the named defendants in this constitutional exception to the doctrine of sovereign immunity to which the Supreme Court did allude in *Larson v. Domestic & Foreign Commerce Corporation,*

supra.

The people are the sovereign, *Lee*, supra. and sovereign powers are delegated to the government subject to constitutional limitation of that power. This is an action against the sovereign government; for under the principles of *reciprocity* and *natural equity* the sovereign government may not unconstitutionally take those constitutional guarantees which inured to totally disabled veterans under the war powers clause of the Constitution. Vain attempts by the defendant Government and defendant appellate Court to shift responsibility downward to defendant Government's employees (approximately sixty in number) and the public policy rationale imputing absolute immunity to the defendant Courts cannot void the constitutionally based obligation of the American people to totally disabled veterans. The people and the sovereign government did fail to meet their reciprocal constitutional obligation to a totally disabled veteran.

The following facts, which were documented in the prior litigation (S.Ct. case 01-203) and accepted as true in the current litigation; are judicially complete such as to provide standing for a decision on the questions of law presented:

1. Blough is a combat disabled veteran recognized as totally and permanently disabled by the Department of Veterans Affairs. Blough has two artificial legs and loss of use of one hand as a result of service in Vietnam (App. at A128-129).

2. The administrative record in the current and prior litigation speaks to the unconstitutional taking by the defendant Courts. This fact was confirmed upon review of the administrative

record by the Chief Judge for the defendant district Court (App at A37-38).

"The province of the court," as Chief Justice Marshall said in *Marbury v. Madison*, 5 U.S. (1 Cranch) (1803) "is solely, to decide on the rights of individuals." The questions presented are questions of constitutionally which are within the jurisdiction of the Supreme Court under the rules developed in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936). The Supreme Court will not pass on constitutional questions unless such adjudication is unavoidable, *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101; and the case may not be disposed of on "some other ground" as provided for in *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947). The defendant district Court and defendant appellate Court have; in three consecutive suits for damages, deprived Blough of procedural due process by unconstitutionally creating "other grounds" for dismissal to avoid addressing a specific constitutional right of America's totally disabled veterans. It is repugnant to the constitution that; those lower Courts which have intentionally and unconstitutionally deprived a totally disabled veteran of his substantive and procedural due process rights by adjudication, have claimed immunity for their unconstitutional taking. It is equally repugnant to the constitution; that this Supreme Court, described as the "guardian and protector of the Constitution" in *Mississippi v. Johnson*, S.C. 4 Wall. 475 (1866), has thus far abstained from it's constitutional responsibility to totally disabled veterans (Supreme Court case 01-203).

CONCLUSION

In a democracy, the people will not tolerate a government which abuses its power and then claims immunity for its actions. The constitutional obligation to totally disabled veterans prohibits those actions of thesovereign government which sicken the heart, soul and conscious of the American people. The constitutionally based principles of *reciprocity* and *natural equity* place constitutional limitations upon the Federal Judiciary such as to protect the constitutional rights of America's totally disabled veterans from unconstitutional taking.

The Supreme Court has since inception provided guidance to constitutional powers and guarantees made possible by those Americans summoned to war by the constitution. Blough; a totally disabled veteran, was repeatedly threatened with physical injury, harassed and retaliated against in the employ of the Federal Government. Since complaining to the defendant Courts in 1998, Blough has been repeatedly and intentionally denied that constitutional guarantee of procedural due process for which he paid dearly in Vietnam. The defendant Courts are without immunity to this systemic and intentional abuse of constitutional authority.

WHEREFORE, Blough respectfully requests that the Supreme Court vacate the Order of the defendant appellate Court and remand the case with proper instruction and positive resolution to those questions of law which are of national significance in addressing the constitutional obligation to protect a specific Fifth Amendment right of America's one hundred seventy thousand totally disabled veterans.

Respectfully submitted.

Melvin E. Blough pro se

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL 33511
(813) 651-3158

APPENDIX

TO THE PETITION FOR WRIT OF CERTIORARI

No.

In The

Supreme Court of the United States

Melvin E. Blough,

Petitioner

v.

United States of America,
Supreme Court of the United States,
William H. Rehnquist, Chief Justice of the Supreme Court, United States Court of Appeals for the Eleventh Circuit, United States District Court Middle District of Florida Tampa Division,

Respondent(s)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IN THE ABSENCE OF JUDICIAL PROFILING BY THE SUPREME COURT

[DO NOT PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 21 2002
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12177
Non Argument Calendar

D.C. Docket No. 02-00194-CV-T-27

MELVIN E. BLOUGH

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
U.S. SUPREME COURT, et al,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

---

(November 21, 2002)
Before ANDERSON, DUBINA and WILSON, Circuit Judges.

PER CURIAM:

Melvin E. Blough proceeding pro se, appeals the district court's dismissal under 28 U.S.C. section 1915(e)(2)(B) of his civil suit naming as defendants the United States of America; the Supreme Court of the United States; William H. Rehnquist, Chief Justice of the Supreme Court; the United States Court of Appeals for the Eleventh Circuit; and the United States District Court for the Middle District of Florida, Tampa Division. Blough claims that the defendants deprived him of his Fifth Amendment right to procedural due process by improperly applying *res judicata* to Blough's previous lawsuits.* On appeal, Blough again argues, *inter alia*, that the defendants have avoided addressing his constitutional rights as a disabled United States veteran, by applying *res judicata* to his lawsuits.

After review of the record and upon consideration of the parties' briefs, we find error, but affirm on other grounds. The district court erred by dismissing Blough's complaint pursuant to 28 U.S.C. section 1915(e)(2)(B) because that statute only applies to in forms pauperis proceedings. Yet, we may uphold the district court's judgment if any other grounds can sustain the decision. *See Trans Caribbean Lines v. Tracor Marine*, 748 F.2d 568, 571 (11th Cir. 1984). A complaint may be dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) if it is clear that no relief can be granted under any set of facts that could be proven in support of the claim. *See Conley v.*

*The prior panel decision involving Blough did not include any of the judges participating in this case. Accordingly, we are not recused. See *Bolin v. Story*, 225 F.3d 1234 (11th Cir. 2002.)

Gibson, 355 U.S. 41, 45-46 (1957) (applying the Rule for Fed. R. Civ. P. 12(b)(6) dismissals). Here, the claims against an individual judge are unavailing because judges are judicially immune from suit when they act within their jurisdiction and within their judicial capacity. *See Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978); *Bolin v. Story*, 225 F.3d 1234, 1239 (11th Cir. 2000)(per curiam). The claims against the named courts in the United States are also insufficient pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, "the Supreme Court held that a plaintiff could state a cause of action and recover money damages against a federal official for constitutional violations occurring under the color of federal law." *See Lee v. Hughes*, 145 F.3d 1272, 1275 (11th Cir. 1998) *cert. Denied*, 525 U.S. 1138 (1999). But, "*Bivens* authorizes suits against federal officials, not against the United States." *McCollum v. Bolger*, 794 F.2d 602, 608 (11th Cir. 1986), *cert. Denied*, 479 U.S. 1034 (1987). Even if Blough amended his complaint to name the individual judges as defendants, these judges would be entitled to judicial immunity for previous rulings and orders entered within their jurisdiction and within their judicial capacities.

Therefore, the district court's dismissal is affirmed pursuant to Fed. R. Civ. P. 12(b)(6).

AFFIRMED.

CONSTITUTIONAL PROVISIONS, PUBLIC LAWS, STATUTES AND RULES INVOLVED

CONSTITUTION OF THE UNITED STATES

We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Article 1. section 8. The Congress shall have power -

To declare war:

To raise and support armies:

Article 3. section 2, clause 1. Jurisdiction of Courts

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, ...to Controversies to which the United States shall be a Party ...

AMENDMENTS TO THE CONSTITUTION

The Fifth Amendment to the United States Constitution provides in part that "no person shall be ... deprived of life, liberty, or property, without due process of law ...." U.S. Const. amend V.

PUBLIC LAW 85-857
(Sept. 2, 1958)
"Veterans' Benefits"

Title 38 U.S.C., Part II, Chapter 11:

Compensation for Service-Connected Disability or Death.

Subchapter II - Wartime Disability Compensation

Sec. 310. Basic entitlement. For disability resulting from personal injury suffered or disease contacted in line of duty..... in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled ..... compensation as provided in this subchapter.

STATUTES

TITLE 28 UNITED STATES CODE

Judiciary and Judicial Procedure

Section 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Section 1291. Final decisions of district courts

The courts of appeal ..... shall have jurisdiction of appeals from all final decisions of the district courts of the United States...

Section 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 10. Considerations Governing Review on Certiorari

A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) A United States court of appeals .... has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power...

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

Melvin E. Blough,

Plaintiff

Case No. 8:02-CIV-194-T-24TGW

v.

United States of America,
Supreme Court of the United States,
William H. Rehnquist, Chief Justice of the Supreme Court, United States Court of Appeals for the Eleventh Circuit, United States District Court Middle District of Florida Tampa Division,

Defendants.

COMPLAINT WITH DEMAND FOR JURY TRIAL

1. PLAINTIFF:

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL 33511

2. DEFENDANTS:

United States of America,
Supreme Court of the United States, William H. Rehnquist, Chief Justice of the Supreme Court,

BEST AVAILABLE COPY

United States Court of Appeals for the Eleventh Circuit, United States District Court Middle District of Florida Tampa Division,
Office of the Clerk of the Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543-0001

3. JURISDICTION:

The evils which it is suggested may arise from interference of courts with the exercise of powers essential to government, are illusory, and are insignificant in comparison with the proposition that no relief can be granted when it is asserted that the United States has authorized the wrong. *United States v. Lee*, 106 U.S. 196 (1882).

No continuing relation between the Federal Government (hereafter "Government") and a citizen is more distinctively federal in character than that between it and the totally and permanently disabled veteran. The scope, nature, implied contracts and reciprocal obligations of the relation are derived from the constitution, are governed by federal authority, have been the subject of Congressional recognition since the inception of the Republic. The Government has the exclusive power to establish and define the relation by virtue of its military and other powers (including the powers of Congress to 'provide for the common Defence,' 'To declare War,' 'raise and support Armies,' and 'make all laws which shall be necessary and proper for carrying into execution the foregoing powers,' U.S. Const., Art. I, section 8).

The Supreme Court has recognized the authority of the Government to cause its citizens to become disabled veterans and compel the inception of said

relationship as essential to "the very conception of a just government and its duty to the citizen" pursuant to the constitutional authority of Congress to declare war. *Arver v. United States*, 245 U.S. 366 (1918). It is inherent in the constitutional authority and purpose of the named defendants' (hereafter "Courts") to independently safeguard those *special* rights which are created by the exercise of powers specific to the constitution.

Title 28 section 1331 of the United States Code provides for federal jurisdiction over the subject matter of this complaint which arose under Article I. Section 8, cl. 11, 12, 18 and Article III. Section 2 of the Federal Constitution in concert with the Fifth Amendment to the Constitution.

Article III. Section 1 of the Constitution limits judicial power in this complaint to those Courts whose judicial misconduct is the subject matter of the complaint. Justice and reason require that plaintiff's request for trial by jury be honored by this court.

4. CAUSE OF ACTION NEGATING CLAIM TO SOVERIGN IMMUNITY:

The "national debt" is not measured in dollars, but rather in the number of lives lost and lives crippled in service to America by its veterans. With the exception of the memorial obligation to those who lost their lives in service to their country; the American people have no greater debt than to the totally and permanently disabled veterans.

This cause of action addresses the *special* right of totally and permanently disabled veterans to appear and be heard by the Courts in complaints of threats of physical injury by the Government. It is difficult to

imagine a claim more deserving of the Fifth Amendment right to procedural due process. It is unconscionable that the Government, in the capacity of the named defendants', has summarily deprived a totally and permanently disabled veteran of the right to procedural due process in a Federal cause of action.

The framers of the Constitution and the forty-two million Americans who served during periods of war would be appalled by a Federal Judiciary which intentionally creates a judicial barrier (*res judicata)* depriving a totally and permanently disabled veteran (plaintiff) of the *opportunity to be heard* in both a complaint of Fifth Amendment violations by the Government and the conflict between the exclusive remedy inferred by the Supreme Court in *Brown v. General Services Administration*, 425 U.S. 830, 836 (1976) and the statutory exception provided to veterans under section 712 Title VII of the Civil Rights Act of 1964, as amended. The specific allegations forming the basis for this cause of action are presented in item number five below.

Plaintiff was inducted into the United States Army and became a combat disabled veteran with two artificial legs and loss of use of one hand. Plaintiff is recognized by the Department of Veterans Affairs as totally and permanently disabled.

"The exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of the people. It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need; and the right to compel it. In fact the

duty of the citizen to render military services and the power to compel him against his consent to do so was expressly sanctioned by the Constitution of at least nine of the states, an illustration being afforded by the following provision of the Pennsylvania Constitution of 1776: 'That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportion toward the expense of that protection, and yield his personal service when necessary, or an equivalent thereof.'" *Arver v. United States*, supra.

Taking of private property by the Government in time of war: "Private rights, under such extreme and imperious circumstances (war), must give way for the time to the public good, but the Government must make full restitution for the sacrifice. ' A great mass of human transactions depend upon implied contracts which are not written, but grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations which, as honest, fair and just men, they ought to have made'. There can be no more comprehensive definition of an implied contract. It applies to governments as well as individuals, and determines the liabilities of each, with the same regard to justice and reason. *United States v. Russell*, S.C., 13 Wall., 623-632 (1871) (citing *Chief Justice Marshall, Gibbons v. Ogden*, 12 Wheat., 341). *Indebitatus assumpsit* is founded upon what the laws term an implied promise on the part of the defendant to pay what, in good conscience, he is bound to pay to the plaintiff, but the law will not imply a promise to pay unless some duty creates such an obligation". *United States v. Russell*, supra.

"The exercise of the war powers is (except in respect to property destroyed by military operations, United States v. Pacific Railroad, 120 U.S. 227, 239 (1887))

subject to the guarantees of the Fifth Amendment." *Hamilton v. Kentucky Distillers & Warehouse Co.*, 251 U.S. 146 (1919)(citing *United States v. Russell*, supra.).

The exercise of war powers by the Government did impose substantial pain and sacrifice upon the lives and liberties of totally disabled veterans which remains with them for the remainder of their lives; as does the special relation to the Government and the debt of the American public. As the Supreme Court recognized the constitutional obligation (implied promise) to Fifth Amendment rights in *United States v. Russell*, supra.; *Hamilton v. Kentucky Distillers & Warehouse Co.*, supra.; and *Jacobs v. United States*, 54 U.S. 27 (1933); so must the Courts in the case of totally and permanently disabled veterans, for the implied promise (obligation) exists within the constitution and was created by the exercise of powers specific to the constitution. The guarantees of the Fifth Amendment attach to the continuing liability for those sacrifices which cannot be made whole and provide recourse to the totally disabled veteran for additional injuries which sicken the heart, soul and conscious of America. Congress has provided wartime disability compensation and an extensive array of benefits under Public Law 85-857 (Title 38 U.S.C.) in recognition of the continuing obligation.

The Fifth Amendment to the Constitution does place limitations upon the judicial power of the Courts in that no person shall be deprived of life, liberty, or property without due process of law.

The Supreme Court has held that a cause of action for damages is a property right, and thus cannot be taken without due process. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a

minimum they require that the deprivation of life, liberty or property by adjudication be proceeded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

"Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. What the Constitution does require is 'an *opportunity* * * * granted at a meaningful time and in a meaningful manner,' *Armstrong v. Manzo, 85 S. Ct. 1187 (1965)*, 'for [a] hearing appropriate to the nature of the case. In short, ' within the limits of practicability,' a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause. *Boddie v. Connecticut*, 91 S. Ct. 780, 786 (1971) (citing *Mullane v. Central Hanover Bank & Trust Co*, supra).

"Under our constitutional system, certain rights are protected against government action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. But in the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event." *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949).

"Under our system (of government) the *people* are the sovereign". *United States v. Lee*, supra. Since the Act of May 8, 1792 the sovereign has honored an implied contract as a nation to protect and provide for those who have borne the burden of war and the Supreme Court has recognized constitutional obligations

founded upon the exercise of the war powers clause of the Constitution. *Arver v. United States*, supra.; *United States v. Russell*, supra.; *Hamilton v. Kentucky Distillers & Warehouse Co.*,. The sovereign; which has no greater obligation than to protect the constitutional rights of totally and permanently disabled veterans, is without immunity to this claim of constitutional limitation directed to the judicial power of the Courts.

5. ALLEGATIONS:

The named Courts did not act independently to protect the *special* rights of plaintiff in the initial or subsequent litigation and are therefore named as defendants' in the current litigation.

ALLEGATION NUMBER ONE

The basis of this federal claim does create a cause of action for money damages in that the basis in itself can fairly be interpreted as mandating compensation for the damage sustained. This federal claim is based upon the violation of an implied contract of the sovereign conferring a constitutional right to procedural due process which is "so rooted in the traditions and conscience of our people as to be ranked as fundamental", *Palko v. State of* Connecticut, 302 U. S. 319 (1937). The constitutional right is *indebitatus assumpsit* to the totally and permanently disabled veteran whose status is inherent to the constitutional power of Congress to declare war. *Arver v. United States*, supra.

The Courts are liable for the abuse of constitutional powers in complaints of Fifth Amendment rights violations by totally and permanently disabled veterans. A constitutional right is fundamental if it is "preservative of all rights". *Yick Wo v. Hopkins*, 118

U.S. 356, 370 (1886). The Constitution mandates that the Courts afford totally and permanently disabled veterans meaningful *opportunity to be heard* in specific allegations of Fifth Amendment substantive due process violations by the Government. The Courts have denied a fundamental constitutional obligation of "We, the people of the United States" to a totally and permanently disabled veteran.

ALLEGATION NUMBER TWO

The judicial conduct of the Courts in the initial litigation was deliberately indifferent to plaintiff's Fifth Amendment procedural due process rights. *Estelle v. Gamble*, 429 U.S. 97 (1976); *Collins v. City of Harker Heights, TEX.*, 503 U.S. 115 (1992).

ALLEGATION NUMBER THREE

The Courts did abandon justice and reason in the subsequent litigation and intentionally deprive a totally and permanently disabled veteran of his constitutional guarantee of fair procedure in connection with the deprivation of a Fifth Amendment liberty interest by the Government.

The finding of *res judicata* in the subsequent litigation was a deliberate act based upon intentional misrepresentations by the Courts for the purpose of depriving plaintiff of procedural due process in the federal cause of action and question of law stated below.

ALLEGATION NUMBER FOUR

The federal cause of action (stated below) did appear affirmatively on the face of the record, was raised and presented for decision at all stages of the initial and

subsequent litigation. Plaintiff was deprived of his opportunity to be heard in the initial and subsequent litigation of a specific legal right, (federal cause of action and question of law stated below), which was judicially independent of the judgment rendered in the complaints under Title VII Section 717 of the Civil Rights Act of 1964, as amended and the Rehabilitation Act of 1973, as amended, based upon the statutory exception under Title VII Section 712 of the Civil Rights Act of 1964, as amended and the findings of the Supreme Court in *Washington v. Davis*, 96 S. Ct. 2040 (1976).

There was no "final" determination by the Courts as to plaintiff's complaint of constitutional tort in the initial litigation and therefore the judgment as *res judicata* in the subsequent litigation was an abuse of constitutional power. *Hovey v. Elliott*, 167 U.S. 409 (1897); *Southern Pacific R. Co. v. United States*, 18 S. Ct. at 27 (1897).

ALLEGATION NUMBER FIVE

The court record in the initial litigation and subsequent litigation clearly demonstrates that plaintiff met the required procedures and presented his claim with the proper pleadings as to be afforded the opportunity to be heard. The Courts chose to ignore their own procedures and precedents to deprive a totally and permanently veteran of the *opportunity* to be heard. The Courts buried plaintiff's constitutional cause of action and related question of law under the shroud of "moot" and "*res judicata*"; when in fact neither doctrine applied. The actions of the Courts epitomize "the play and action of purely personal and arbitrary power" which is not within the definition of "due process of law", *Dent v. State of West Virginia*, 129 U.S. 114 (1889).

The deprivation of procedural due process by the Courts in the initial and subsequent litigation, did deny plaintiff his constitutional right to have the Government answer to the cause of action for damages in the claim of Fifth Amendment liberty interest violations.

ALLEGATION NUMBER SIX

The Supreme Court did exceed its constitutional authority and usurp the authority of Congress in *Brown v. General Services Administration*, 425 U.S. 830, 836 (1976). The exclusive remedy inferred by the Supreme Court in *Brown v. General Services Administration*, supra. has deprived those veterans in the employ of the Federal Government of their constitutional rights which are excepted from the Supreme Courts ruling by statute under Title VII section 712 of the Civil Rights Act of 1964, as amended. The deliberate indifference of the Courts to address this question of law in the initial and subsequent litigation was an abuse of constitutional power affecting the constitutional rights of millions of veterans in the employ of the Federal Government.

6. SUMMARY OF PRIOR LITIGATION AND FACTS PROVIDING BASIS TO INSTANT COMPLAINT:

Plaintiff filed the initial lawsuit on June 29, 1998, against the Government pursuant to Title VII of the Civil Rights Act of 1964, as amended (Case No. 98-1358Civ-T-24E). Plaintiff filed two motions with the district court; the first to amend the initial complaint to include a cause of action under the Rehabilitation Act of 1973, as amended and the second cause of action for deprivation of a Fifth Amendment liberty interest. On September 17, 1999 the district court did

issue an Order pursuant to defendant's motion for summary judgment on the cause of action under Title VII of the Civil Rights Act of 1964, as amended. The initial paragraph of the Order did reference the motions to amend under the Rehabilitation Act of 1973 and the Fifth Amendment. The final paragraph of the Order provides for denial of the Title VII and Rehabilitation Act actions based upon the merits; and passive (without comment within the Order) denial as moot "all other motions pending in this action" (including the claim of constitutional tort). Plaintiff appealed the moot ness of his Fifth Amendment claim to the appellate court (Case No. 99-13735), which entered a Judgment on May 9, 2000 acknowledging the Fifth Amendment claim; however affirming the district court's denial as moot and (as with the district court) remaining silent as to the basis for the court's action. The aforementioned proceedings are hereafter referred to as the "initial litigation".

Plaintiff returned to the district court and on August 8, 2000 did again file a Fifth Amendment complaint of constitutional tort against the Government (Case No. 8:00-CV-1631-T-26E) alleging those constitutional rights violations which were alleged in the initial litigation. By Order dated November 21, 2000 the district court did grant defendants' motion for summary judgment based upon the doctrine of *res judicata*. By Judgment dated May 22, 2001 the appellate court did affirm the district court (Case No. 00-16546). Plaintiff did appeal to the United States Supreme Court (Case No. 01-203) with the result that the petition for writ of certiorari was denied without comment October 1, 2001 and the petition for rehearing was denied without comment January 7, 2002. The aforementioned proceedings are hereafter referred to as the "subsequent litigation".

FACTS IN SUPPORT OF ALLEGATIONS

Federal Cause of Action

Totally disabled veterans have an inherent Fifth Amendment liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the Federal Government.

This cause of action was initially presented by petitioner in the course of a district court hearing (Doc. 25, 32); in a motion to amend initial complaint (Doc. 97, 104); in response to Government's motion for summary judgment (Doc. 107); in the brief/ reply brief/petition for rehearing en banc of the appeal in the initial litigation; in the complaint as filed with the district court in the subsequent litigation (Doc. 1); in response to Government's motion for summary judgment (Doc. 10); in the brief/reply brief/petition for en banc consideration in the appeal ; and in the petition for writ of certiorari and petition for rehearing to the Supreme Court in the subsequent litigation. The Government, the district court (Doc. 111, 11), the appellate court, and the Supreme Court were silent to this cause of action in the initial and subsequent litigation.

Question of Law

Title VII section 712 of the Civil Rights Act of 1964, as originally enacted and as amended in 1972, states that "nothing contained in this title shall be construed to repeal or modify any *Federal*, State, territorial, or local *law creating special rights* or preference *for veterans*". In *Brown v. General Services Administration*, 425 U.S.830, 836 (1976) the Supreme Court held that "(Title VII)

section 717 of the Civil Rights Act of 1964, as amended in 1972, provides the exclusive judicial remedy for claims of discrimination in federal employment."

Recognition of the constitutional cause of action as stated above provides a *special right* (under Title VII section 712 of the Civil Rights Act of 1964) of exception to the exclusive judicial remedy inferred by the Supreme Court in *Brown v. General Services Administration*, supra.

This question of law was initially presented by plaintiff in the course of a district court hearing (Doc. 25, 32); in the motion to amend the complaint (Doc. 97, 104); in the brief /reply brief/petition for rehearing en banc of the appeal in the initial litigation; and in response to Government's motion for summary judgment (Doc. 10); in the brief/reply brief/petition for en banc consideration in the appeal ; in the petition for writ of certiorari and petition for rehearing to the Supreme Court in the subsequent litigation. The district court (Doc. 111, 11), the appellate court, and the Supreme Court were silent as to this question of law in the initial or subsequent litigation. Government did rely, in its motion for summary judgment in the subsequent litigation (Doc. 8), upon the Supreme Court's determination that section 717 of Title VII of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment, *Brown v. General Services Administration*, 425 U.S. 830 (1976), and therefore; did assert that plaintiff had no legal basis to complain of violations under the Fifth Amendment to the Constitution. The Government did also claim the limitations of *Brown v. General Services Administration*, supra, in the initial litigation within Government's motion (Doc. 99) in opposition to

plaintiff's motion to amend the initial complaint (Doc.1) to include a claim of constitutional tort (Doc. 97, 104).

The complaint as initially filed with the district court on June 29, 1998 did encompass a claim of civil rights violations under Title VII of the Civil Rights Act of 1964, as amended (Doc.1). The notification provided to Government in the initial litigation not only met, but exceeded the requirements of *Baldwin County Welcome Center*, supra, *Coon v. Georgia Pacific Corp.*, supra, and *Conley v. Gibson*, supra. The actions describing when, how, to whom, and with what results were spelled out in great detail within the initial complaint; including, but not limited to the disabled veteran status and physical disabilities of plaintiff, the threats of physical injury to plaintiff and the informal response/formal acceptance of said threats by the Government (Department of the Treasury and the Equal Employment Opportunity Commission).

At the conclusion of a preliminary injunction hearing (Doc. 32) plaintiff stated that the basis in his claim is that the Government violated his Fifth Amendment right to liberty with threats of physical injury. The court responded that "there is an emotional distress".

Prior to the preliminary injunction hearing plaintiff did timely file documentation (Doc. 25) which was subsequently entered into the court record with the consent of the Government. Among those documents was confirmation of plaintiff's status as a 100% permanent and totally disabled veteran, third-party confirmation of the physical threats against plaintiff (EEOC decision dated December 5, 1996 page 2), and the following statements by plaintiff: "As a 100% service-connected disabled veteran Plaintiff had a Constitutional right not to be threatened with physical

injury under the analysis presented in *Washington v. Glucksberg*, 117, S. Ct. 2258 (1997); Title VII Section 712 of the Civil Rights Act of 1964 provides that 'nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans'; 'We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today'. *Washington v. Davis*, 96 S. Ct. 2040 (1976)."

Plaintiff did motion the district court to amend the initial complaint (Doc.1) to bring action under the Rehabilitation Act of 1973, as amended and the Americans with Disabilities Act of 1990 (Doc. 33).

Plaintiff did motion the district court to amend the initial complaint (Doc. 1) under Rule 15(a) of the Federal Rules of Civil Procedure to include a claim of action against Government for deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the Constitution (Doc. 97). Within this motion plaintiff did provide the following statements: "Under the analysis presented by the United States Supreme Court in Washington v. Glucksberg, 117 S. Ct. 2258 (1997) ; a one hundred percent (100%) physically disabled veteran has a fundamental Constitutional right not to be threatened, harassed and retaliated against by the same government which put him in harms way in Viet nam. Title VII of the Civil Rights Act of 1964 is not the exclusive remedy for Plaintiff in that Section 712 of the Act provides that 'nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans'."

The notification provided to Government in the motion to amend (Doc. 97) not only met, but exceeded the requirements of *Baldwin County Welcome Center*, supra, *Coon v. Georgia Pacific Corp.*, supra, and *Conley v. Gibson*, supra. The defendant was apprised of the substance of the allegation and the grounds upon which it rests. The actions describing when, how, to whom, and with what results were spelled out in great detail within the initial complaint (Doc. 1) and were "also the basis of this Fifth Amendment claim".

The issues proposed by the amended claim of constitutional tort (Doc. 97) were legal and required no additional discovery to posture them for adjudication.

Government did motion the court (Doc. 99) in opposition to plaintiff's "constitutional tort claims, alleging deprivation of his due process of law under the Fifth Amendment". Government's stated position was that a claim of constitutional tort was not available to plaintiff based upon the exclusive remedy inferred by the Supreme Court in *Brown v. General Services Administration*, supra.

Plaintiff did motion the court (Doc. 104) to file a memorandum of law in support of the motion to amend for a claim of constitutional tort (Doc. 97). The following legal arguments were provided in response to Government's motion in opposition: "Section 712 of Title VII of the Civil Rights Act of 1964 (USC Title 42, Chapter 21, Subchapter VI, section 2000e-11) provides that Title VII is not the exclusive remedy to Plaintiff who has been recognized by Defendant as a one-hundred percent (100%) disabled veteran. Section 712 of Title VII was not referenced in *Brown v. General Service Administration*, supra and therefore was not a fact in consideration by the Court. 'We have never held that the constitutional standard for

adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.' *Washington v. Davis*, supra."

In a memorandum (Doc. 105) authorized by Court Order to be filed in support of the motion to amend for action under the Rehabilitation Act of 1973, as amended (Doc. 33), plaintiff did reference the court to the pending "claim for deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the United States Constitution". Plaintiff did also reference said claim in plaintiff's response to defendant's motion for summary judgment (Doc. 107).

Defendants' motion for summary judgment (Doc. 75) and plaintiff's response (Doc. 107) were limited to the initial complaint under Title VII of the Civil Rights Act of 1964, as amended. Plaintiff did incorporate sworn depositions attesting to the threats of physical injury to Plaintiff.

The following statement is presented within the initial paragraph of the Order of the district court in the initial litigation (Doc. 111):

"This cause comes before the Court on defendant's Motion for Summary Judgment (Doc. No. 75). Plaintiff has filed a response in opposition (Doc. No. 107). Also before the Court is plaintiff's Motion to Amend Complaint (Doc. No. 33) and defendant's response in opposition (Doc. No. 36). Plaintiff has also filed various papers which appear to be addressed to his Motion to Amend Complaint and/or his response to defendant's Motion for Summary Judgment. See Doc. Nos. 104 and 105."

Document 104 was a five page memorandum of law in support of plaintiff's motion the amend the initial complaint to include a claim of constitutional tort against the Government (Doc. 97) and was filed in response to the Government's motion in opposition to plaintiff's motion to so amend (Doc. 99). In referencing document 104 within the Order, the district court judicially involved plaintiff's claim of constitutional tort and the Government's response (Doc. 97, 99, 104).

The following statement is presented within the final paragraph of the Order of the district court in the initial litigation (Doc. 111):

"Accordingly, it is ORDERED AND ADJUDGED that defendant's Motion for Summary Judgment (Doc. No. 75) is GRANTED. The Clerk is instructed to CLOSE Case No. 98-1358-Civ.-T-24(E). Plaintiff's Motion to Amend Complaint (Doc. No. 33) is DENIED for the reasons set forth in this Order. All other motions pending in this action are DENIED AS MOOT."

The judicial conduct of the district court in the initial litigation was deliberately indifferent to the constitutional rights of a totally and permanently disabled veteran.

Plaintiff, a disabled veteran with two artificial legs and loss of use of one hand, did appear before a Federal Court and claim a Fifth Amendment violation in that the Government threatened "to push him down a flight of stairs" (Doc. 32) and documented the threat (Doc. 25). The courts response was to summarily dismiss the claim as "emotional distress" (Doc. 32). None of America's one hundred and seventy thousand totally disabled veterans should be subject to such arrogance by a Federal Court.

The Order of the district court is flawed on its face, in that the initial paragraph involves a document (104) filed by plaintiff in support of the motion to amend for claim of constitutional tort (97) and in response to Government's motion in opposition to said motion (99); however the Order by the district court failed to adjudicate the motion to amend for the claim of constitutional tort (97,104).

The motion to amend for claim of constitutional rights violations (Doc. 97, 104) was not moot due to the exception pleaded to plaintiff under section 712 Title VII of the Civil Rights Act of 1964 and the differing legal standards referenced in *Washington v. Davis*, supra. No "final order" was issued "on the merits" of plaintiff's claim of constitutional tort. The district court was silent as to the basis in its ruling that the federal cause of action was moot.

It is obvious the district court failed to review plaintiff's pleadings in the initial litigation in that the Order of the district court (Doc. 111) does not reference the motion to amend for constitutional tort (Doc. 97, 99, 104) which was prominent in plaintiff's pleadings. Review of the Order of the district court (Doc. 111) in conjunction with plaintiff's response to Government's motion for summary judgment (Doc. 107) provides further evidence that the district court did not review plaintiff's pleadings. The Order misrepresents the pleadings of both parties, creates an absurd scenario and then ridicules plaintiff for proposing said scenario.

Plaintiff did appeal the district court Order denying his claim of constitutional tort as moot. In opposition to the decision rendering the claim moot, plaintiff did argue the legal principles presented in *Sherman v.*

Hallbauer, 455 F.2d 1236 (5th Cir. 1972); *Murphy v. Hunt*, 102 S. Ct. 1181 (1982) and *Sears, Roebuck and Co. v. Mackey*, 76 S. Ct. 895 (1956). Plaintiff also provided the appellate court with copies of all relevant motions filed with the district court (Doc. 1, 25, 32, 33, 97, 99, 104, 106, 107) and did contrast said motions with the Order of the district court (Doc. 111) demonstrating that no "final order" was issued "on the merits" of plaintiff's claim of constitutional tort and the claim was not moot.

Plaintiff did also argue the cause of action for constitutional tort (Doc. 97, 104) and the exceptions presented (i.e. Title VII section 712 of the Civil Rights Act of 1964, as amended; and *Washington v. Davis*, supra.) with legal support by *Washington v. Glucksberg*, supra.; *Detroit Bank v. United States*, 63 S. Ct. 297; *Bolling v. Sharpe*, 74 S. Ct. 693 (1954); *Schneider v. Rusk* 84 S. Ct. 1187 (1964); *Yick Wo v. Hopkins*, 6 S. Ct. 1064; *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

The appellate court ruled summarily that "the district court did not abuse its discretion when it denied Blough's (plaintiff's) motion to amend his complaint"; however was silent as to the district court's basis in ruling the federal cause of action moot.

The Judgment by the appellate court provided acknowledgement that the federal cause of action (Doc. 97, 99, 104) appeared affirmatively on the face of the record and was raised and presented for decision in the initial litigation; however the silence as to the district court's basis in ruling the federal cause of action moot was an affirmation of the deliberate indifference by the district court.

Plaintiff returned to the district court and filed a second Fifth Amendment complaint of constitutional tort (Doc. 1) against the Government alleging the same cause of action for constitutional rights violations which were alleged in the initial litigation (Doc. 97, 104). The notification provided to Government in the subsequent litigation not only met, but exceeded the requirements of *Baldwin County Welcome Center*, supra, *Coon v. Georgia Pacific Corp.*, supra, and *Conley v. Gibson*, supra. As in the case of the initial complaint; the same actions describing when, how, to whom, and with what results were spelled out in great detail; including, but not limited to the disabled veteran status and physical disabilities of plaintiff, the threats of physical injury to plaintiff and the informal response/formal acceptance of said threats by the Government.

Plaintiff advised the district court of its failure in the initial litigation to address the allegations of constitutional rights violations which were presented as an amendment to the complaint of civil rights violations and were again before the court. Plaintiff also referenced the failure of the court in the initial litigation to address the merits of the complaint of constitutional tort under the standards required by the United States Supreme Court in *Washington v. Davis*, supra.

Government filed a motion for summary judgment (Doc. 8) based upon the assertions that plaintiff's action was barred by *res judicata* and Title VII of the Civil Rights Act of 1964 which provides the exclusive judicial remedy for claims of discrimination in federal employment (citing *Brown v. General Services Administration*, 96 S. Ct. 1961 (1976)). Government failed to reference the motion filed by Government in the initial litigation (Doc. 99) in opposition to plaintiff's

motion to amend for constitutional tort (Doc. 97, 104).

In the response to Governments' motion for summary judgment (Doc. 10) plaintiff did argue in opposition to the assertion that the claim be denied as *res judicata* based upon the legal principles presented in *Murphy v. Hunt*, supra; *Sears, Roebuck and Co. v. Mackey*, supra; *United States v. Moser*, 45 S. Ct. 66 (1924); *Southern Pacific R. Co. v. United States*, 18 S. Ct. 18 (1897); *Cromwell v. County of Sac*, 94 U.S. 351 (1877); *Montana v. U.S.*, 99 S. Ct. 970 (1979); and *Washington v. Davis*, supra. Plaintiff did also provide the appellate court with copies of all relevant motions filed in the initial complaint (Doc. 1, 25, 32, 33, 97, 99, 104, 106, 107) and did contrast said motions with the Order of the district court (Doc. 111) in demonstrating that no "final order" was issued "on the merits" of plaintiff's claim of constitutional tort in the initial litigation and therefore the doctrine of *res judicata* did not apply to the complaint of constitutional tort currently before the court nor was the claim moot in the initial litigation.

Plaintiff did also argue the cause of action for constitutional tort with legal support by *Washington v. Glucksberg*, supra.; *United States v. Gilman*, 74 S. Ct. 695 (1954) (citing *Detroit Bank v. United States*, supra.); *Currin v. Wallace*, 59 S. Ct. 379; *Steward Machine Co. v. Davis*, 57 S. Ct.(1883); *Ferguson v. Skrupa*, supra. Plaintiff did also argue in opposition to the Supreme Courts decision in *Brown v. General Services Administration*, supra. as a basis for denial in that section 712 of Title VII of the Civil Rights Act of 1964 provides that "nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans".

"As gleaned from the parties' submissions, the material facts are undisputed.

His (plaintiff's) only contention is that '[n]either the district court nor the appellate court have ruled on the merits of this complaint of constitutional tort... which was properly filed in conjunction with the initial complaint'.

Moreover, as the Plaintiff has conceded, the claim he asserts in this case was always a part of the claim he asserted in the prior case.*

*Even if this were not, it is manifestly clear from the record that the Plaintiff was well aware of this so-called constitutional tort claim based on the Fifth Amendment at the very inception of the earlier case and, therefore could easily have raised it in that case.

** As the Defendants correctly observe, the parties to both suits are the Plaintiff and the United States.

*** Because the Court agrees that *res judicata* mandates the entry of summary judgment for the Defendants, it need not reach the alternative argument advanced by the Defendants for summary judgment.

The Defendants' Motion for Summary Judgment (Dkt. 8) is granted."

The statement by the district court that "as gleaned from the parties' submissions, the material facts are undisputed" is a misrepresentation by the court. The court chose to ignore the facts as presented by plaintiff and relied exclusively upon the limited and

incomplete facts presented by Government in denying the complaint based upon *res judicata.*

The Opinion (Doc. 11) referenced the fact plaintiff complained of constitutional tort in the initial litigation and then went on to deny the complaint based upon *res judicata* because plaintiff failed to raise the constitutional tort claim in the initial litigation. The district court was in possession of plaintiff's motion to amend for claim of constitutional tort in the initial litigation (Doc. 97, 104), the Governments' motion in opposition (Doc. 99), and the Opinion of the district court (Doc. 111). The Opinion of the district court in the subsequent litigation (Doc. 11) intentionally chose to ignore these documents which did clearly present a federal cause of action (Doc. 97, 99, 104) which appeared affirmatively on the face of the record and was raised and presented for decision in the initial litigation; however was not adjudicated by the Order of the district court (Doc. 111).

The deliberate indifference of the district court in the initial litigation (reference to "Doc. 104 as motion to amend complaint" with no further comment) is reflected within the Order by the court (Doc. 111). The intentional misrepresentations by the district court in the subsequent litigation is reflected within the Order issued by that court (Doc. 11). The statement within the district court Opinion (Doc. 11) that (plaintiff's) only contention is that '[n]either the district court nor the appellate court have ruled on the merits of this complaint of constitutional tort... which was properly filed in conjunction with the initial complaint'; followed by the statement that plaintiff failed to raise the claim of constitutional tort based upon the Fifth Amendment in the initial litigation was an intentional misrepresentation of the facts before

the court (Doc. 97, 99, 104, 111) for the purpose of depriving plaintiff of due process of law.

Plaintiff did appeal the district court Order denying his claim of constitutional tort as *res judicata* based upon the following statement by the trail judge in the dispositive Order (Doc. 11) which reflects upon a continuing abuse of power by the courts in the myopic view of the facts presented (R1-10) in plaintiff's asserted right to due process of law:

> "Moreover, as the Plaintiff has conceded, the claim he asserts in this case was always a part of the claim he asserted in the prior case. Even if it were not, it is manifestly clear from the record that the Plaintiff was well aware of the so-called constitutional tort claim based on the Fifth Amendment at the very inception of the earlier case and, therefore, could easily have raised it in that case."

In the response to the Order by the district court (Doc. 11) granting defendants' motion for summary judgment (Doc. 8) plaintiff did argue in opposition to the decision that the claim be denied as *res judicata* based upon the same legal principles presented in plaintiff's response to Government' motion for summary judgment (Doc. 10). Plaintiff did also provide the appellate court with copies of all relevant motions filed in the initial complaint (Doc. 1, 25, 32, 33, 97, 99, 104, 106, 107) and did contrast said motions with the Order of the district court (Doc. 111) in demonstrating that no "final order" was issued "on the merits" of plaintiff's claim of constitutional tort in the initial litigation and therefore the doctrine of *res judicata* did not apply to the complaint before the court.

Plaintiff did also argue the cause of action for constitutional tort and in opposition to the Supreme Courts decision in *Brown v. General Services Administration*, supra. as a basis for denial. Finally, plaintiff did argue that he had been denied his right to due process of law with legal support in *Boddie v. Connecticut*, supra; *Daniels v. Williams*, 106 S. Ct. 662, 665 (1986) (citing *Parratt v. Taylor*, 101 S. Ct. 1908 (1981)); *Armstrong v. Manzo*, 85 S. Ct. 1187, 1191 (1965); in that "a fundamental requirement of due process is the opportunity to be heard". *Grannis v. Ordean*, 34 S. Ct. 779, 783. Plaintiff was denied a full and fair opportunity to litigate in the initial litigation and therefore the doctrine of res judicata did not apply to the Order of the district court (R1-11).

The appellate court did summarily respond that "we have reviewed Blough's (plaintiff) complaint, the proceedings in the 1998 case as contained in the record, and all other relevant portions of the record. Having considered these documents together with the parties' briefs, we find no reversible error. His 1998 case was decided against him by a final order on the merits by a court of competent jurisdiction. Blough's claim that the application of res judicata denies him due process has no merit, because he had notice and an opportunity to be heard in the 1998 case."

Plaintiff did appeal to the United States Supreme Court presenting the cause of action and the question of law presented on pages nine and ten of this complaint. The cause of action and the question of law were presented under the constitutional provisions of the War Powers Clause, art. 1, section 8, cl. 11, 12, 18; the Jurisdiction of Courts Clause, art 3, section 2, cl. 1; and the Fifth Amendment.

Plaintiff did also complain that the lower courts abused their constitutional authority in the denial of that process which is due the constitutional obligation and statutory exception as presented.

"The statutory exclusion provision of section 712 of Title VII of the Civil Rights Act of 1964, as amended, is compatible with the restrictions of section 717 of said Act. It is the blanket exclusive remedy of section 717 of the Act as inferred by the United States Supreme Court in *Brown v. General Services Administration*, supra, which is challenged based upon facts specific to this case. This is a case of first impression in addressing the exception of section 712 Title VII of the Civil Rights Act of 1964."

The United States Supreme Court did deny petitioner's petition for writ of certiorari and petition for rehearing without comment.

7. RELIEF:

WHEREFORE; the sovereign is without immunity to this claim of constitutional limitation directed to the judicial power of the named defendants'. Based upon the Courts alleged violations of plaintiff's procedural due process right and the obvious conflict of interest, it is requested that resolution of this complaint be deferred to plaintiff's Seventh Amendment right to trial by jury. Compensatory damages in the amount of twenty million dollars ($20,000,000) are sought.

"S/Melvin E. Blough" pro se
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(813) 651-3158

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED
02 FEB-5 PM 12:50
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

Melvin E. Blough

Plaintiff,

Case No. 8:02-CV-194-T-24TGW

v.

United States of America, Supreme Court of the United States, William H. Rehnquist, Chief Justice of the Supreme Court, United States Court of Appeals for the Eleventh Circuit, United States District Court Middle District of Florida Tampa Division,

Defendants,

MOTION FOR REASSIGNMENT OF CASE DIRECTED TO ELIZABETH A. KOVACHEVICH AS CHIEF JUDGE

The initial papers were filed in this action on February 4, 2002 and Susan C. Bucklew was randomly selected as the presiding judge.

The complaint pending before this court alleges deliberate and intentional denial of due process by the named defendants'. Judge Bucklew was the presiding judge in the initial litigation (Case No. 98-1358-CIV-T-24E) and Judge Lazzara in the subsequent litigation (Case No. 8:00-CV-1631-T-26E). An obvious conflict

of interest exists in the assignment of this case to either Judge Bucklew or Judge Lazzara.

WHEREFORE; it is requested that this case be reassigned to a judge detached from the prior litigation.

"S/Melvin E. Blough" pro se
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803 Tomahawk Trail
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(813) 651-3158

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via first class mail to United States Attorney Mac Cauley (Suite 3200, 400 North Tampa Street, Tampa, FL. 33602) this fifth day of February, 2002 in accordance with Federal Rule of Civil Procedure 5.

"S/Melvin E. Blough" pro se

Melvin E. Blough

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED
02 MAR-1 AM 10:03
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

MELVIN E. BLOUGH,
Plaintiff,

vs. CASE NO. 8:02-CIV-194-T-24-TGW

UNITED STATES OF AMERICA,
Et al.,
Defendants.

_____/

ORDER

This cause is before the Court on the plaintiff's "Motion for Reassignment of Case Directed to Elizabeth A. Kovachevich as Chief Judge" (Docket No. 4). The undersigned has reviewed the three cases filed in this court by the plaintiff, the instant case, Blough v Rubin, Case No. 8:98-CIV-1358-T-24, Blough v Department of the Treasury, Case No. 8:00-CIV-1631-T-26, and finds the plaintiff's request to be well-taken. Accordingly, it is

ORDERED that the motion for reassignment (Docket No. 4) be **granted** and the Clerk of Court is **directed** to reassign this case by random draw to another district judge, except that Judge Lazzara shall not be assigned to the case.

DONE and ORDERED in Chambers, in Tampa, Florida, this 1st day of March, 2002.

"S/ELIZABETH A. KOVACHEVICH"
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to: All parties and counsel of record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED
02 APR 15 PM 12:22
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

Melvin E. Blough

Plaintiff,

Case No. 8:02-CIV-194-T-27TGW

v.

United States of America,
Supreme Court of the United States, William H. Rehnquist, Chief Justice of the Supreme Court, United States Court of Appeals for the Eleventh Circuit, United States District Court Middle District of Florida Tampa Division,

Defendants,

AMENDMENT TO COMPLAINT AS A MATTER OF COURSE UNDER RULE 15(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

ALLEGATION NUMBER SEVEN

The facts as presented reflect upon the abuse of judicial power by the named defendants. This Fifth Amendment complaint of constitutional limitation will fail if plaintiff's Seventh Amendment right to trial by jury is denied or otherwise nullified by defendants. It is constitutionally void for the defendants to substitute themselves for the jury or otherwise rule

upon their own liability.

MEMORANDUM OF FACTS AND LAW IN SUPPORT OF ALLEGATION

This complaint is unique as to the facts and issues of Constitutional law presented. Plaintiff, as a totally and permanently disabled veteran, did initially complain to the Federal courts of threats of physical injury by the Federal government (Federal cause of action for damages as Fifth Amendment liberty interest violation) and the response by the Federal courts (as the guardian of due process under Article III the Constitution) was to intentionally deprive plaintiff of his Fifth Amendment right to procedural due process. The Supreme Court has held that a cause of action for damages is a property right and cannot be taken by adjudication without due process. *Mullane v.Central Hanover Bank and Trust Co.*, supra. Plaintiff's only recourse is to return to the same Federal courts (named defendants) to complain of constitutional limitation directed to the abuse of judicial power by the named defendants in the denial of plaintiff's Fifth Amendment property right in the prior litigation.

America's totally disabled veterans who became disabled pursuant to the Constitutional power of Congress to declare war did so in anticipation of receiving those rights guaranteed by the United States Constitution. These constitutional guarantees extend beyond those acquired in merely being born or naturalized as an American and are specific to those totally disabled veterans who paid dearly for said rights. Plaintiff, a totally and permanently disabled veteran, spent ten months crawling around the jungles of Vietnam fighting with the North Vietnamese and two years in an Army hospital where the surgeons

attempted to repair his injuries. The legal basis to the Constitution and Declaration of Independence require that plaintiff not be denied his constitutional rights by the same Government which placed him in harms-way.

"Where the United States is the defendant and the plaintiff is not suing for money improperly extracted or retained, the basis of the federal claim – whether it be the Constitution, a statute, or a regulation – does not create a cause of action for money damages unless ....that basis 'in itself can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *United States v. Testan*, 424 U.S. 393, 403 (1976) (citing *Eastport S.S. Corp. v. United States*, 372 F.2d at 1008). The legal basis to the instant complaint (as in the prior complaints) does mandate compensation for the damage sustained.

"It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages". *Larson v. Domestic & Foreign Commerce Corporation*, supra. The Supreme Courts hesitation to entertain suits for specific relief in *Larson v. Domestic & Foreign Commerce Corporation* is absent in this suit for damages directed to the sovereign. Plaintiff has made six affirmative allegations of constitutional limitations upon the defendant courts' powers and has made claim that the defendant courts' actions amounted to an unconstitutional taking by the sovereign. This complaint provides a modern example of "a specific application of the constitutional exception to the doctrine of sovereign immunity". *Larson v. Domestic & Foreign Commerce Corporation*, at 696.

"By the Act constituting the judicial system of the United States, the district courts are courts both of common law and admiralty jurisdiction. In all cases at common law, the trial must be by jury." *The Sarah* 8 Wheat, 390 (1823). By "common law" the framers of the Constitution of the United States meant what the Constitution denominated in the third article, "law;" not merely its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction to those where equitable rights alone were regarded, and equitable remedies were administered. *Parsons v. Bedford et al.* 3 Peters, 433 (1830). The amendment to the Constitution of the United States, by which the trial by jury was secured, may, in a just sense, be well construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. *Parsons v. Bedford*, supra.

Based upon the jurisdictional restrictions noted in *The Sarah* Court, the foresight of the *Parsons* Court, and the careful considerations of the *Larson* Court; the District court is the only forum within which plaintiff may bring this common law suit for damages against the sovereign with trial by jury.

WHEREFORE; the Complaint is amended to request that all dispositive motions be deferred to plaintiff's Seventh Amendment right to trial by jury.

"S/Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL 33511
(813) 651-3158

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Patricia A. Kerwin (Suite 3200, 400 North Tampa Street, Tampa, FL. 33602) this fifteenth day of April, 2002 in accordance with Federal Rule of Civil Procedure 5.

"S/Melvin E. Blough" pro se

Melvin E. Blough

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED
02 APR 12 AM 10:02
CLERK, U.S DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

MELVIN E. BLOUGH,

Plaintiff(s),

vs. **CASE NO. 8:02-CIV-194-T-27TGW**

UNITED STATES OF AMERICA, SUPREME COURT OF THE UNITED STATES, WILLIAM H. REHNQUIST, CHIEF JUSTICE OF THE SUPREME COURT, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION,

Defendant(s).

_____/

ORDER

THIS CAUSE came on to be considered on Plaintiff's *pro se* Complaint with Demand for Jury Trial (Dkt. 1). The Court having reviewed the Complaint and being otherwise fully advised in the premises, **FINDS** as follows:

"A civil action is commenced by filing a complaint with the court." FED.R.CIV.P.3. The complaint must contain, inter alia, "a short and plain statement of the claim showing that the pleader is entitled to relief." FED.R.CIV.P.8(a)(2). Although a plaintiff is not required to set forth an intricately detailed description of the asserted basis for relief, it is required that the pleadings "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957). While pro se pleadings are to be construed liberally, Haines v. Kerner, 404 U.S. 519 (1972), the Plaintiff's Complaint fails to assert any discernible basis for the relief sought against any named defendant. The Court therefore finds that the action in its present form is frivolous under 28 U.S.C. Section 1915(e)(2)(B). The petition lacks an arguable basis in law or in fact and even liberally construed, is based on an indisputably meritless legal theory. See Neitzke v. Williams, 490 U.S. 319 (1989). Accordingly, it is

ORDERED AND ADJUDGED:

1. This cause is **DISMISSED.**

2. Any pending motions are DENIED as moot.

3. The Clerk is directed to close this case.

DONE AND ORDERED in chambers this 11th day of April, 2002.

"S/JAMES D. WHITMORE"
JAMES D. WHITMORE
United States District Judge

Copies to:
Counsel and Pro Se Parties of Record
Law Clerk

02-12177-F

IN THE
United States Court of Appeals
Eleventh Circuit

MELVIN E. BLOUGH,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA, SUPREME COURT OF THE UNITED STATES, WILLIAM H. REHNQUIST, CHIEF JUSTICE OF THE SUPREME COURT, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION,

Defendant-Appellee(s).

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION (D.C. Docket NO.: 8:02-CIV-194-T-27TGW)

BRIEF FOR APPELLANT

MELVIN E. BLOUGH
Pro Se - Appellant
803 Tomahawk Trail
Brandon, FL 33511
(813) 651-3158

BOUGH v. UNITED STATES OF AMERICA, SUPREME COURT OF THE UNITED STATES, WILLIAM H. REHNQUIST, CHIEF JUSTICE OF THE SUPREME COURT, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION,

(11th Cir. - No. 02-12177-F)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned hereby certifies that the following listed persons and entities have an interest in the outcome of this case:

1. Melvin E. Blough, plaintiff-appellant;

2. Susan H. Rothstein-Youakim, Assistant United States Attorney; Office of United States Attorney Middle District of Florida;

3. Patricia W. Kerwin, Assistant United States Attorney; Office of United States Attorney Middle District of Florida;

4. Paul I. Perez, United States Attorney Middle District of Florida;

5. John Ashcroft as Attorney General of the United States.

6. The Honorable Susan C. Bucklew, as United States District Court Judge Middle District of Florida, Tampa Division (Case No. 8:98-CIV-1358-T-24);

7. The Honorable Richard A. Lazzara, as United States District Court Judge Middle District of Florida, Tampa Division (Case No. 8:00-CIV-1631 -T-26);

8. The Honorable James D. Whittemore, as United States District Court Judge Middle District of Florida, Tampa Division (Case No. 8:02-CIV-194-T -27TGW);

9. The Honorable Circuit Judges Godbold, Roney, Hill, Fay, Kravitch, Clark, Anderson, Tjoflat, Edmondson, Cox, Birch, Dubina, Black, Carnes, Barkett, Hull, Marcus and Wilson to the United States Court of Appeals for the Eleventh Circuit (Case No. 99-13735 and Case No. 00-16546);

10. The United States District Court Middle District of Florida, defendant-appellee;

11. The United States Court of Appeals for the Eleventh Circuit, defendant-appellee;

11. The Supreme Court of the United States, defendant-appellee.

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument.

TABLE OF CONTENTS

	Page
Certificate of Interested Persons	(i) – (ii)
Statement Regarding Oral Argument	(iii)
Table of Contents	(iii)
Table of Citations and Authorities	(iv) - (vi)
Statement of Jurisdiction	(vii)
Statement of Issues Presented for Review	1
Statement of the Case and Facts	2-3
(i) Course of proceedings and disposition in the court below	2
(ii) Statement of facts	2-3
(iii) Standard of review	3
Summary of Arguments	3-4
Arguments and Citations of Authority	4-15
Conclusion	15-18
Certificate of Service	19

TABLE OF CITATIONS AND AUTHORITIES

Page (s)

CASES:

Arver v. United States,
245 U.S. 366 (1918) 6, 8, 12

Ashwander v. Tennessee Valley Authority,
297 U.S. 288 (1936) 17

Baldwin County Welcome Center v. Brown,
446 U.S. 151 (1984) 10

Brown v. General Services Administration,
425 U.S. 830 (1976) 12, 14

Collins v. City of Harker Heights, TEX;
503 U.S. 115 (1992) 13

Conley v. Gibson,
355 U.S. 41, 47 (1957) 10

Coon v. Georgia Pacific Corp.,
829 F2d. 1563, 1569 (11th Cir. 1987) 10

Davis v. Passman,
442 U.S. 228, 242 (1979) vii

Dent v. State of West Virginia,
129 U.S. 114 (1889) 9, 14, 15

Estelle v. Gamble,
429 U.S. 97, 113 (1976) 13

Hamilton v. Kentucky Distillers & Warehouse Co.,

251 U.S. 146 (1919) 7, 8

Harris v. McRae,
448 U.S. 297, 308 (1980) 5

Hovey v. Elliott,
167 U.S. 409 (1897) 14

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,
340 U.S. 211 (1951) 17

Larson v. Domestic & Foreign Commerce
Corporation, 337 U.S. 682 (1949) 8, 9

Lehr v. Robertson,
463 U.S. 248 (1983) 5

Marbury v. Madison,
5 U.S. (1 Cranch) (1803) 16

McCulloch v. Maryland,
17 U.S. 316 (1819) vii

Mullane v. Central Hanover Bank and Trust Co.,
339 U.S. 306, 313 (1950) 2, 11,15

Neitzke v. Williams,
490 U.S. 319 (1989) 10, 15

Palko v. State of Connecticut,
302 U.S. 319 (1937) 4, 12

Rescue Army v. Municipal Court,
331 U.S. 549 (1947) 17

Siegert v. Gilley,
500 U.S. 226, 233 (1991) 5

Southern Pacific R. Co. v. United States,
168 U.S. 1 (1897) 14

Spector Motor Service, Inc. v. McLaughlin,
323 U.S. 101 17

United States v. Lee,
106 U.S. 196 (1882) 1, 8, 9

United States v. Russell, S.C.,
13 Wall., 623-632 (1871) 6, 7, 8

Washington v. Davis,
426 U.S. 229, 240, 248 (1976) 13

Washington v. Glucksberg,
521 U.S. 702, 720 (1997) 7

Yick Wo v. Hopkins,
118 U.S. 356, 370 (1886) 13

CONSTITUTIONAL PROVISIONS:

U.S. Constitution, article 1, section 8,
clause 11, 12. vii, 5

U.S. Constitution, article 3, section 2,
clause 1. vii, 1, 2, 4

U.S. Constitution amendment V vii, 2, 5-20

U.S. Constitution amendment VII vii, 16

PUBLIC LAWS/STATUTES:

Public Law 85-857 (Veterans Benefits) 5

Title 38 U.S.C. Veterans Benefits 5

Title 28 U.S.C. sections:

1254(2) 18

1654 16

RULES:

Rules of the United States Supreme Court:

Rule 10(a) 16

STATEMENT OF JURISDICTION

Jurisdiction over the subject matter of this complaint arose under Article I. (Section 8, cl. 11, 12) and Article III. (Section 2, cl. 1) of the Federal Constitution in concert with the Fifth and Seventh Amendments to the Constitution.

The appeal (Doc 21) from the final Order of April 11, 2002 by the United States District Court for the Middle District of Florida (Doc 19) was timely filed and docketed in this Court on April 22, 2002 as Case No. 02-12177-F.

> "Statutory rights and obligations are established by Congress ..... The Constitution, on the other hand, does not 'partake of the prolixity of a legal code' *McCulloch v. Maryland*, 17 U.S. 316 (1819). It speaks instead with a majestic simplicity. One of 'its important objects,' *ibid.*, is the designation of rights. And in 'its great outlines,' *ibid.*, the judiciary is clearly discernible as the primary means through which these rights may be enforced." *Davis v.Passman*, 442 U.S. 228, 242 (1979).

Article 3. section 2, clause 1 of the Constitution does, upon its face, limit judicial power in this complaint to those Defendants-Appellees (hereafter "Courts") whose judicial misconduct in the prior litigation is the subject matter of the current litigation. Justice requires the Courts to look within the *majestic simplicity* of the constitution and accept the truth that it is unconstitutional to rule upon their own liability in the absence of sovereign immunity. The Courts are a means by which constitutional rights may be enforced, not abused.

The respective Courts are without judicial authority to determine liability in this complaint; as they are the alleged violators of Plaintiff-Appellant's (hereafter Blough's) Fifth Amendment right to procedural due process. The Courts can no more cease to be defendants by donning judicial robes, than Osama bin Laden can become Willie Nelson by putting on a cowboy hat. They are each the product of their actions. The liability of the Courts for their actions is properly determined *by the people* in trial by jury.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The dynamics of the questions presented are dependant upon recognition of a constitutional obligation; conferring a specific right which is *indebitatus assumpsit* to the totally disabled veteran; whose status is inherent to the constitutional power of Congress to declare war.

As of September 30, 2000; one hundred seventy thousand three hundred seven (170,307) veterans were recognized by the United States Department of Veterans Affairs as totally disabled (100%) (source: Department of Veterans Affairs FY 2000 Annual Report).

The constitutional obligation to totally disabled veterans and the judicial conduct of the Federal courts are matters of national concern. The Federal judiciary was established under Article III of the Constitution; however the "power and influence (of the Federal judiciary) rests solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives." *United States v. Lee*, 106 U.S. 196 (1882).

1. Did the war powers clause of the Constitution create a constitutional obligation to totally disabled veterans guaranteeing an inherent constitutional right to procedural due process in complaints of threats of physical injury by the United States Government ?

2. Does the denial of procedural due process by the Federal Judiciary, under the facts presented in question number one, provide a constitutional exception to the doctrine of sovereign immunity in a complaint of constitutional limitation directed to the Federal Judiciary ?

3. Is it constitutionally void for the Federal Judiciary to substitute themselves for the jury or otherwise rule upon their own liability in the absence of sovereign immunity ?

STATEMENT OF THE CASE

This complaint is unique as to the facts and issues of constitutional law presented. Blough, as a totally disabled veteran, did previously complain to the Courts of threats of physical injury by the Federal Government (Federal cause of action for damages as Fifth Amendment liberty interest violation) and the response by the Courts (as the guardian of due process under Article III the Constitution) was to intentionally deprive Blough of his Fifth Amendment right to procedural due process (Doc 1 at Pgs 6-20). The Supreme Court has held that a cause of action for damages is a property right and cannot be taken by adjudication without due process (Doc 1 – Pg 5). *Mullane v.Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). This complaint of constitutional limitation is directed to the abuse of judicial power by the Courts.

(i) Course of proceedings and disposition in the court below:

The defendant district court summarily dismissed Blough's complaint as frivolous based on an indisputably meritless legal theory (Doc 19).

(ii) Statement of the facts:

Blough did appeal the prior decisions by the defendant district court (Blough v. Rubin, Case No. 8:98-CIV-1358-T-24, and Blough v. Department of the Treasury, Case No. 8:00-CIV-1631-T-26) to the defendant appellate court (Case No. 99-13735, and Case No. 00-16546) alleging denial of procedural due process by the respective district court. The respective appeals were summarily denied by the court of appeals. See discussion in complaint (Doc 1

at Pg 15, 18-19).

Blough's only recourse was to return to the same Courts in the instant complaint and complain of constitutional limitation directed to the abuse of judicial power by the Courts in the denial of Blough's Fifth Amendment property right in the prior litigation (Doc 1 at Pg 8-20).

Blough did, upon filing of the instant complaint, Motion the Chief Judge for the district court to reassign the case to a trial judge not involved in the prior litigation in that the instant complaint is based upon allegations of deliberate and intentional denial of due process by the Courts (Doc 4).

The Order by the Chief Judge for the district court, in response to Blough's Motion, states that "the undersigned has reviewed the three cases filed in this court by the plaintiff, the instant case, Blough v. Rubin, Case No. 8:98-CIV-1358-T-24, Blough v. Department of the Treasury, Case No. 8:00-CIV-1631-T-26, and finds the plaintiff's request to be well-taken." (Doc 12).

The soundness of the decisions and the purity of the motives of the defendant district court and defendant appellate court in the prior litigation are brought into question by the thorough review of the same case files by the Chief Judge of the district court in the current litigation. The Chief Judge of the district court is to be commended for her honesty.

Ignoring the commendable effort to correct past injustice by the Chief Judge (Doc 12), the reassigned trial judge summarily dismissed the complaint as frivolous based on an indisputably meritless legal theory (Doc 19).

(iii) Standard of review:

Abuse of judicial power by the defendant district court and the absence of judicial authority to determine liability by the defendant Courts, limits review to the three questions of law presented. The defendant Courts are not immune to claims of constitutional limitations and obligations directed to the abuse of judicial power.

SUMMARY OF THE ARGUMENTS

Blough has been denied due process of law as the Courts have assumed the rolls of judge, jury and defendant since the inception of the initial complaint on June 29, 1998. The Courts (with the exception of the Chief Judge for the district court) have intentionally ignored specific facts for the purpose of judicially profiling the Fifth Amendment rights of a totally disabled veteran. The result has been a system of justice closely paralleling that experienced by Alice in Wonderland.

In the initial complaint, the defendant district court did ignore a timely filed amendment (and the Government's response) alleging constitutional tort by the Government. The cause of action for constitutional tort was noted, but not addressed in either the defendant district or appellate court rulings. Blough did return to the same Courts to complain that the Courts had failed to address the cause of action for constitutional tort. The defendant district and appellate courts did falsely state that no amendment was filed in the initial litigation and summarily dismissed Blough's complaint (even though the amendment and Government's response were plainly within the court record of the initial complaint). In the instant complaint, the Chief Judge for the defendant

district court did review the court records in the prior complaints in conjunction with the instant complaint and determine that sufficient evidence of judicial abuse was presented within the records to warrant reassignment of the case to a judge not involved with the prior litigation (Doc 12). The reassigned trial judge; who chose to ignore the facts and the effort by the Chief Judge to correct the past abuse of power by the Courts, summarily dismissed the alleged improprieties by the Courts as frivolous. This is a complaint of constitutional limitation direct to the Courts, not for the abuse of judicial discretion; but rather for the dictatorial abuse of their judicial power under Article III. Section 2, clause 1 of the Constitution.

It is Blough's legal position that the United States Constitution, as amended, provides an obligation (inherent constitutional right) to totally disabled veterans which negates the claim of sovereign immunity to the denial of procedural due process by the Courts. Further; it is constitutionally void for the Courts to substitute themselves for the jury or otherwise rule upon their own liability in the absence of sovereign immunity. The dispositive Order by the defendant district court (Doc 19) is prima facie to judicial abuse as a named defendant rules upon its own liability.

ARGUMENT AND CITATIONS OF AUTHORITY

This appeal warrants acceptance and consideration in matters of federal law and national import as to which the Supreme Court has final jurisdiction based upon the following considerations:

1. Recognition of a constitutional obligation conferring an inherent constitutional right which

is "so rooted in the traditions and conscience of our people as to be ranked as fundamental". *Palko v. State of Connecticut,302* U.S. 319 (1937).

No continuing relation between the Federal Government (hereafter "Government") and a citizen is more distinctively federal in character than that between it and the totally disabled veteran. The scope, nature, implied contracts and reciprocal obligations of the relation are derived from the constitution, are governed by federal authority, and have been the subject of Congressional recognition since the inception of the Republic. The Government has the exclusive power to establish and define the relation by virtue of its military and other powers (including the powers of Congress to 'provide for the common Defence,' 'To declare War,' 'raise and support Armies,' and 'make all laws which shall be necessary and proper for carrying into execution the foregoing powers,' U.S. Const., Art. I, section 8). The determination by the Government as to status as a totally disabled veteran is provided under P.L. 85-857, Title 38 U.S.C., Part II, Chapter 11, Subchapter II, sections 1110, 1114(j).

The instant complaint provides the following cause of action (Doc 1–Pg 3):

> "This cause of action addresses the *special* right of totally and permanently disabled veterans to appear and be heard by the Courts in complaints of threats of physical injury by the Government. It is difficult to imagine a claim more deserving of the Fifth Amendment right to procedural due process. It is unconscionable that the Government, in the capacity of the named defendants', has summarily deprived a totally and permanently disabled veteran of the right to

procedural due process in a Federal cause of action."

The analytical structure under which this claim of constitutional limitation should be addressed is presented in *Siegert v. Gilley*, 500 U.S. 226, 233 (1991), as opposed to *Harris v. McRae*, 448 U.S. 297, 308 (1980). The adequacy of due process is dependant upon the adjudication of the constitutional right presented. When due process clause is invoked in novel context, court must begin inquiry with determination of precise nature of private interest that is threatened, and only after that interest has been identified, can court properly evaluate adequacy of process. *Lehr v. Robertson*, 463 U.S. 248 (1983).

An objective of the Constitution was to define governmental powers in general terms in order that the people of the United States may (among other stated purposes) establish justice, ... provide for the common defence, ... and secure the blessings of liberty. To those objectives Congress was granted the power to declare war, raise and support armies; and the Courts were granted judicial power in all cases in Law arising under the Constitution to which the United States is a Party.

"The exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of the people. It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need; and the right to compel it. In fact the duty of the citizen to render military services and the power to

compel him against his consent to do so was expressly sanctioned by the Constitution of at least nine of the states, an illustration being afforded by the following provision of the Pennsylvania Constitution of 1776: 'That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportion toward the expense of that protection, and yield his personal service when necessary, or an equivalent thereof.'" *Arver v. United States*, 245 U.S. 366 (1918).

Taking of private property by the Government in time of war: "Private rights, under such extreme and imperious circumstances (war), must give way for the time to the public good, but the Government must make full restitution for the sacrifice. 'A great mass of human transactions depend upon implied contracts which are not written, but grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations which, as honest, fair and just men, they ought to have made'. There can be no more comprehensive definition of an implied contract. It applies to governments as well as individuals, and determines the liabilities of each, with the same regard to justice and reason. *United States v. Russell*, S.C., 13 Wall., 623-632 (1871) (citing *Chief Justice Marshall, Gibbons v.Ogden*, 12 Wheat., 341). *Indebitatus assumpsit* is founded upon what the laws term an implied promise on the part of the defendant to pay what, in good conscience, he is bound to pay to the plaintiff, but the law will not imply a promise to pay unless some duty creates such an obligation". *United States v. Russell*, supra.

The "national debt" is not measured in dollars, but rather in the number of lives lost and lives crippled in service to America by its veterans. With the exception of the memorial obligation to those who lost their lives in service to their country; the American people have no greater debt than to the totally disabled veterans.

It is inherent to the constitutional authority and purpose of the Courts to independently safeguard those special rights of totally disabled veterans which were created by the exercise of powers specific to the constitution.

America's totally disabled veterans who became disabled pursuant to the Constitutional power of Congress to declare war did so in anticipation of receiving those rights guaranteed by the United States Constitution. These constitutional guarantees extend beyond those acquired in merely being born or naturalized as an American and are specific to those totally disabled veterans who paid dearly for said rights. These constitutional guarantees are derived from an *implied contract* of which *Chief Justice Marshall* spoke in Gibbons v. Ogden, *12 Wheat., 341.* A citizen who defends the constitution in time of war is guaranteed the rights within the constitution. "The Government must make full restitution for the sacrifice". *United States v. Russell,* supra. These are those stipulations which honest, fair and just men would have made. The constitutional guarantees (rights) of totally disabled veterans are inherent to their status as totally disabled veterans.

The exercise of the war powers is subject to the guarantees of the Fifth Amendment. *Hamilton v. Kentucky Distillers & Warehouse Co.*, 251 U.S. 146 (1919)(citing *United States v. Russell,* S.C.,13 Wall. 623, 627). The exercise of war powers by the

Government did impose substantial pain and sacrifice upon the lives and liberties of totally disabled veterans which remains with them for the remainder of their lives; as does the special relation to the Government and the debt of the American public. The guarantees of the Fifth Amendment attach to the continuing liability for those sacrifices which cannot be made whole and provide recourse to the totally disabled veteran for additional injuries which sicken the heart, soul and conscious of America.

The Courts are called upon to recognize an implied promise (obligation) of the constitution guaranteeing a right specific to the status of totally disabled veterans. The implied promise (obligation) exists within the constitution and was created by the exercise of powers specific to the constitution. The Courts are also called upon to recognize a specific Fifth Amendment right inherent to status of America's one hundred seventy thousand totally disabled veterans. They have a constitutional right not to be subject to the abuse of judicial authority by the Courts in complaints of threats of physical injury by the Government.

Recognition of the constitutional obligation conferring a right specific to totally disabled veterans is presented as question number one. As the Supreme Court recognized the constitutional obligation (implied promise) to a Fifth Amendment property right in *United States v. Russell*, supra; so must the Courts in the case of totally disabled veterans.

Based upon the standards established by the Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), totally disabled veterans have an inherent constitutional right to procedural due process in the protection of Fifth Amendment interests

under the United States Constitution.

2. The instant complaint is a claim of constitutional limitation directed to the judicial abuse of Blough's inherent constitutional right to procedural due process by the Courts. As in the case of *United States v. Lee*, 106 U.S. 196 (1882); the instant cause of action "represents a specific application of the constitutional exception to the doctrine of sovereign immunity", *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949).

"Under our system (of government) the people are the sovereign". *United States v. Lee*, supra. Since the Act of May 8, 1792 the sovereign has honored an implied contract as a nation to protect and provide for those who have borne the burden of war and the Supreme Court has recognized constitutional obligations founded upon the exercise of the war powers clause of the Constitution. *Arver v. United States*, supra; *United States v. Russell*, supra; *Hamilton v. Kentucky Distillers & Warehouse Co.*, *supra*. The sovereign; which has no greater living obligation than to protect the inherent constitutional rights of totally disabled veterans, is without immunity to this claim of constitutional limitation directed to the judicial power of the Federal courts.

> "It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages". *Larson v.Domestic & Foreign Commerce Corporation*, supra. The Supreme Courts hesitation to entertain suits for specific relief in *Larson v. Domestic & Foreign Commerce Corporation* is absent in this suit for damages

directed to the sovereign.

Blough has made seven affirmative allegations of constitutional limitations upon the Courts' powers and has made claim that the Courts' actions amounted to an unconstitutional taking by the sovereign. This complaint provides a modern example of "a specific application of the constitutional exception to the doctrine of sovereign immunity". *Larson v. Domestic & Foreign Commerce Corporation*, at 696. (Doc 20–Pg 2).

> "Under our constitutional system, certain rights are protected against government action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. But in the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event." *Larson v. Domestic & Foreign Commerce Corporation*, supra. (Doc 1-Pg 5).

> "The evils which it is suggested may arise from interference of courts with the exercise of powers essential to government, are illusory, and are insignificant in comparison with the proposition that no relief can be granted when it is asserted that the United States has authorized the wrong." *United States v. Lee*, supra. (Doc 1-Pg 2).

The constitutional exceptions to the doctrine of sovereign immunity would encompass those actions of

the sovereign which sicken the heart, soul and conscious of America. Blough came to the Courts in June 1989 as a totally disabled veteran complaining of threats of physical injury in the employ of the Federal Government (Doc 1 at Pg 8-15). The continuous and abusive response of the Courts has been to summarily ignore the facts and law as presented with the intent to deprive Blough of those due process rights for which he paid dearly in Vietnam. The actions of the sovereign would sicken the heart, soul and conscious of America.

Interference with the actions of the Courts is warranted in that the Courts have committed the wrong. In the case at point, Blough's inherent constitutional rights (guarantees) were created by actions of the sovereign. The sovereign may not seek immunity from violating an obligation of its own making.

3. It is constitutionally void for the Courts to substitute themselves for the jury or otherwise rule upon their own liability in the absence of sovereign immunity.

The defendant district court's response to the instant complaint (Doc 1) was limited to the following Order (Doc 19) and is reflective of the continuing judicial abuse of Blough's Fifth Amendment procedural due process right as a named defendant substitutes itself for the jury. The actions of the defendant district court continue to epitomize "the play and action of purely personal and arbitrary power" which is not within the definition of "due process of law", *Dent v. State of West Virginia*, 129 U.S. 114 (1889).

"The Court having reviewed the Complaint and being otherwise fully advised in the premises, FINDS as follows:

The complaint must contain, inter alia, 'a short and plain statement of the claim showing that the pleader is entitled to relief.' FED.R.CIV.P. 8(a)(2). Although a plaintiff is not required to set forth an intricately detailed description of the asserted basis for relief, it is required that the pleadings 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' Conley v. Gibson, 355 U.S. 41, 47 (1957).

While pro se pleadings are to be construed liberally, Haines v. Kerner, 404 U.S. 519 (1972), the Plaintiff's Complaint fails to assert any discernible basis for the relief sought against any named defendant. The Court therefore finds that the action in its present form is frivolous under 28 U.S.C. Section 1915(e)(2)(B). The petition lacks an arguable basis in law or in fact and even liberally construed, is based on an indisputably meritless legal theory. See Neitzke v. Williams, 490 U.S. 319 (1989)."

BLOUGH'S RESPONSE

"The statute accords judges not only the authority to dismiss a claim based upon an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless. Examples of the former class are claims against which it is clear that the defendants are immune from suit ... and claims

of infringement of a legal interest which clearly does not exist." *Neitzke v. Williams*, supra. at 329.

The notification provided to the Courts' in the instant litigation not only met, but exceeded the requirements of *Baldwin County Welcome Center v. Brown*, 446 U.S. 151 (1984) citing Fed. Rule Civ. Proc. 8(a)(2), *Conley v. Gibson*, 355 U.S. 41, 47 (1957), and *Coon v. Georgia Pacific Corp.*, 829 F.2d 1563, 1569 (11th Cir. 1987) (Doc 1 at Pg 1-20). The actions describing when, how, to whom, and with what results were spelled out in great detail within the initial complaint (Doc 1 at Pg 1-20); including, but not limited to the disabled veteran status and physical disabilities of Blough, extensive legal arguments in support of the three questions presented within this appeal, seven detailed allegations of judicial abuse by the Courts, and a very extensive narrative describing the facts providing evidence of judicial abuse in the prior litigation (to which the Order (Doc 12) of the Chief Judge for the defendant district court was directed) .

The factual contentions we not baseless in that the Chief judge for the defendant district court did review the actual court record in the prior litigation in conjunction with the instant complaint and find that Bloughs request for case reassignment based upon "allegations of deliberate and intentional denial of due process by the named defendants"(Doc 4) "to be well-taken"(Doc 12). There are no indications that the reassigned trial judge made such an inquiry or even noted the Order of the Chief Judge (Doc 12) within the record.

Blough did state twelve times within the instant complaint (Doc 1 at Pg 3-12) that his constitutional

right as a totally disabled veteran to procedural due process was denied by the Courts in a claim for damages. The Courts were well advised as to the nature of Blough's claim and the grounds upon which it was based. Allegation number five states that "the deprivation of procedural due process by the Courts in the initial and subsequent litigation, did deny plaintiff his constitutional right to have the Government answer to the cause of action for damages in the claim of Fifth Amendment liberty interest violations" (Doc 1-Pg 8). Blough went on to state that "the Fifth Amendment to the Constitution does place limitations upon the judicial power of the Courts in that no person shall be deprived of life, liberty, or property without due process of law. The Supreme Court has held that a cause of action for damages is a property right, and thus cannot be taken without due process. *Mullane v. Central Hanover Bank & Trust Co.*, supra." (Doc 1-Pg 5). The legal theory which the defendant district court characterized as "undisputably meritless", originated with the United States Supreme Court. The Eleventh Circuit has chosen to ignore the Supreme Court's legal precedent in *Mullane v. Central Hanover Bank & Trust Co.*, supra. for the purpose of denying due process to Blough's complaint of constitutional limitation. The Eleventh Circuit has also, for the third time, taken it upon itself to assume that it is frivolous to allege that totally disabled veterans have a constitutional right to procedural due process in complaints of threats of physical injury by the Federal Government. Blough's complaint, which is neither "frivolous" nor "based upon an undisputably meritless legal theory", is properly certified to the Supreme Court based upon the consistent abuse of judicial power by the defendant district court.

The following comments, law, and allegations are taken from the complaint and further demonstrate

that the cause of action presented to the district court was neither frivolous nor based upon an indisputably meritless legal theory:

> "This cause of action addresses the *special* right of totally and permanently disabled veterans to appear and be heard by the Courts in complaints of threats of physical injury by the Government. It is difficult to imagine a claim more deserving of the Fifth Amendment right to procedural due process. It is unconscionable that the Government, in the capacity of the named defendants, has summarily deprived a totally and permanently disabled veteran of the right to procedural due process in a Federal cause of action. (Doc 1-Pg 3).
>
> The framers of the Constitution and the forty -two million Americans who served during periods of war would be appalled by a Federal Judiciary which intentionally creates a judicial barrier (*res judicata)* depriving a totally and permanently disabled veteran (plaintiff) of the *opportunity to be heard* in both a complaint of Fifth Amendment violations by the Government and the conflict between the exclusive remedy inferred by the Supreme Court in *Brown v. General Services Administration*, 425 U.S. 830, 836 (1976) and the statutory exception provided to veterans under section 712 Title VII of the Civil Rights Act of 1964, as amended. The specific allegations forming the basis for this cause of action are presented in item number five below". (Doc 1-Pg 3).

Blough made a total of seven affirmative allegations of constitutional limitations upon the Courts' powers and made claim that the Courts'

actions amounted to an unconstitutional taking by the sovereign.

ALLEGATIONS (Doc 1 at Pg 6-8, Doc 20-Pg 1)

The named Courts did not act independently to protect the *special* rights of plaintiff in the initial or subsequent litigation and are therefore named as defendants' in the current litigation.

ALLEGATION NUMBER ONE

The basis of this federal claim does create a cause of action for money damages in that the basis in itself can fairly be interpreted as mandating compensation for the damage sustained. This federal claim is based upon the violation of an implied contract of the sovereign conferring a constitutional right to procedural due process which is "so rooted in the traditions and conscience of our people as to be ranked as fundamental", *Palko v. State of* Connecticut, 302 U. S. 319 (1937). The constitutional right is *indebitatus assumpsit* to the totally and permanently disabled veteran whose status is inherent to the constitutional power of Congress to declare war. *Arver v. United States*, supra.

The Courts are liable for the abuse of constitutional powers in complaints of Fifth Amendment rights violations by totally and permanently disabled veterans. A constitutional right is fundamental if it is "preservative of all rights". *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The Constitution mandates that the Courts afford totally and permanently disabled veterans meaningful *opportunity to be heard* in specific allegations of Fifth Amendment

substantive due process violations by the Government. The Courts have denied a fundamental constitutional obligation of "We, the people of the United States" to a totally and permanently disabled veteran.

ALLEGATION NUMBER TWO

The judicial conduct of the Courts in the initial litigation was deliberately indifferent to plaintiff's Fifth Amendment procedural due process rights. *Estelle v. Gamble*, 429 U.S. 97 (1976); *Collins v. City of Harker Heights, TEX.*, 503 U.S. 115 (1992).

ALLEGATION NUMBER THREE

The Courts did abandon justice and reason in the subsequent litigation and intentionally deprive a totally and permanently disabled veteran of his constitutional guarantee of fair procedure in connection with the deprivation of a Fifth Amendment liberty interest by the Government.

The finding of *res judicata* in the subsequent litigation was a deliberate act based upon intentional misrepresentations by the Courts for the purpose of depriving plaintiff of procedural due process in the federal cause of action and question of law stated below.

ALLEGATION NUMBER FOUR

The federal cause of action (stated below) did appear affirmatively on the face of the record, was raised and presented for decision at all stages of the initial and subsequent litigation. Plaintiff was deprived of his opportunity to be heard in the initial and subsequent litigation of a specific legal

right, (federal cause of action and question of law stated below), which was judicially independent of the judgment rendered in the complaints under Title VII Section 717 of the Civil Rights Act of 1964, as amended and the Rehabilitation Act of 1973, as amended, based upon the statutory exception under Title VII Section 712 of the Civil Rights Act of 1964, as amended and the findings of the Supreme Court in *Washington v. Davis*, 96 S. Ct. 2040 (1976).

There was no "final" determination by the Courts as to plaintiff's complaint of constitutional tort in the initial litigation and therefore the judgment as *res judicata* in the subsequent litigation was an abuse of constitutional power. *Hovey v. Elliott*, 167 U.S. 409 (1897); *Southern Pacific R. Co. v. United States*, 18 S. Ct. at 27 (1897).

ALLEGATION NUMBER FIVE

The court record in the initial litigation and subsequent litigation clearly demonstrates that plaintiff met the required procedures and presented his claim with the proper pleadings as to be afforded the opportunity to be heard. The Courts chose to ignore their own procedures and precedents to deprive a totally and permanently veteran of the *opportunity* to be heard. The Courts buried plaintiff's constitutional cause of action and related question of law under the shroud of "moot" and "*res judicata*"; when in fact neither doctrine applied. The actions of the Courts epitomize "the play and action of purely personal and arbitrary power" which is not within the definition of "due process of law", *Dent v. State of West Virginia*, 129 U.S. 114 (1889).

The deprivation of procedural due process by the Courts in the initial and subsequent litigation, did deny plaintiff his constitutional right to have the Government answer to the cause of action for damages in the claim of Fifth Amendment liberty interest violations.

ALLEGATION NUMBER SIX

The Supreme Court did exceed its constitutional authority and usurp the authority of Congress in *Brown v. General Services Administration*, 425 U.S. 830, 836 (1976). The exclusive remedy inferred by the Supreme Court in *Brown v. General Services Administration*, supra. has deprived those veterans in the employ of the Federal Government of their constitutional rights which are excepted from the Supreme Courts ruling by statute under Title VII section 712 of the Civil Rights Act of 1964, as amended. The deliberate indifference of the Courts to address this question of law in the initial and subsequent litigation was an abuse of constitutional power affecting the constitutional rights of millions of veterans in the employ of the Federal Government.

ALLEGATION NUMBER SEVEN

The facts as presented reflect upon the abuse of judicial power by the named defendants. This Fifth Amendment complaint of constitutional limitation will fail if plaintiff's Seventh Amendment right to trial by jury is denied or otherwise nullified by defendants. It is constitutionally void for the defendants to substitute themselves for the jury or otherwise rule upon their own liability."

The defendant district court did not address the cause of action asserted in the complaint (Doc 1 at Pg 3-8), the constitutional right asserted (Doc 1 at Pg 3-6), the waiver of sovereign immunity (Doc 1 at Pg 3-6), nor the absence of judicial authority (Doc 20 at Pg 1-3); but rather chose to base its actions solely upon the words *pro se*, frivolous, and meritless as justification for the defendant district court's actions. The defendant district court chose a personal and arbitrary determination of frivolous as the basis for dismissal (Title 28 section 1915(e)(2)(B)(i)); as opposed to the more specific "failure to state a claim upon which relief may be granted" (section 1915(e)(2)(B) (ii)) or "plaintiff seeks monetary relief against a defendant who is immune from such relief" (section 1915(e)(2)(B)(iii)), both of which were identified as indisputably meritless legal theories in *Neitzke v. Williams*, supra. at 329 and both of which were excepted from said classification within Blough's pleadings.

The Order by the defendant district court (Doc 19) ignores the factual contentions within the complaint (Doc 1) which were supported by the Order of the Chief Judge for the district court (Doc 12) and the legal precedent by the Supreme Court providing basis to the instant complaint (*Mullane v. Central Hanover Bank & Trust Co.*, supra.) (Doc 1-Pg 3). The dispositive Order by the defendant district court does <u>again</u> reflect upon " the play and action of purely personal and arbitrary power" which is not within the definition of "due process of law". *Dent v. State of West Virginia*, supra. It is constitutionally void for the Courts to substitute themselves for the jury or otherwise rule upon their own liability in the absence of sovereign immunity.

CONCLUSION

Question number one invites the Courts to recognize a constitutional obligation to a specific right of those totally disabled veterans whose lives have been adversely affected by the power of Congress to declare war. Questions number two and three address the liability and authority of the Federal Judiciary when said constitutional obligation is abused by the Federal Judiciary. The importance of the constitutional rights of totally disabled veterans, the abusive judicial conduct and loss of judicial authority by the lower Courts are compelling reasons for the Supreme Court to exercise its supervisory authority over the defendant district and appellate courts as provided under U.S.Sup.Ct.R. 10(a). The Supreme Court is a named defendant; however the cause of action is limited to allegation number six of the complaint (Doc 1-Pg 8) which is independent of the questions of law presented.

The issues presented in the complaint are of public importance and responsibility. The initial complaint was filed with demand for jury trail (Doc 1- at Pg 1-2) and was amended, as a matter of right, to request that all dispositive motions be deferred to Blough's Seventh Amendment right to trial by jury (Doc 20 at Pg 1-3). The liability of the Courts' for their actions is properly determined *by the people* in trial by jury.

Blough has complied with the judicial procedures and presented the law and facts in a complete and professional manner since the initial complaint was filed on June 29, 1998; however his constitutional right to procedural due process has been consistently abused by the Courts. Title 28 U.S.C. section 1654 provides that an individual may stand alone before the

Courts. It is unlawful for the Courts to judicially profile an individual's rights based on pro se status. America's 170,703 totally disabled veterans have paid dearly for the right to stand alone and be treated fairly by the Courts. The Courts are statutorily and constitutionally liable for the factual abuse presented within this complaint.

A positive response to the three questions of law presented will not cause an undue burden upon the Federal Judiciary. The right sought to be recognized is specific and constitutionally directed to a select group; waiver of sovereign immunity requires actions by the Government which sicken the heart, soul and conscious of America (a very high standard); and it is justly unconstitutional for the Federal courts to determine their own liability in the absence of sovereign immunity.

The constitutional obligation presented as question number one is not a benefit for veterans to be addressed by Congressional statute. The obligation creates an inherent right under the constitution, directed to totally disabled veterans, which is properly recognized by the Supreme Court as so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental. "The province of the court," as Chief Justice Marshall said in *Marbury v. Madison*, 5 U.S. (1 Cranch) (1803) "is solely, to decide on the rights of individuals."

Questions number one, two, and three are questions of law presented to the district court without response in that the defendant district court summarily dismissed the complaint (Doc 19). Question number one has been presented to the district court three times, the court of appeals twice, and the Supreme Court once. The Courts have all

failed to respond to the question. Grounds not passed on by court of appeals, but argued in Supreme Court orally and in the briefs would be considered by Supreme Court granting certiorari, where such grounds raised only issues of law not calling for examination or appraisal of evidence. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951).

The following facts, which were documented in the prior litigation; are judicially complete such as to provide standing for a decision on the questions of law presented:

1. Blough is a combat disabled veteran recognized as totally and permanently disabled by the Department of Veterans Affairs. Blough has two artificial legs and loss of use of one hand as a result of service in Vietnam (1SR).

2. The administrative record in the current and prior litigation speaks to the abuse of judicial authority by the Courts. This fact was confirmed upon review of the administrative record by the Chief Judge for the defendant district court (Doc 12).

The three questions presented for certification to the Supreme Court are questions of constitutionally which are within the jurisdiction of the Supreme Court under the rules developed in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936). It is the established rule that the Supreme Court will not pass on constitutional questions unless such adjudication is unavoidable, *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101; and the case may not be disposed of on "some other ground" as provided for in *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947).

The defendant district and appellate courts have, in three consecutive suits for damages, deprived Blough of procedural due process by unlawfully creating "other grounds" for dismissal to avoid addressing the constitutional rights of totally disabled veterans. Adjudication by the Supreme Court is unavoidable to prevent further judicial abuse by the lower Courts.

The Constitution, and therefore the Courts; owe their existence to those Americans who were willing to die or become disabled for the guarantees within the Constitution, as amended. Blough spent ten months crawling around the jungles of Vietnam fighting with the North Vietnamese and two years in an Army hospital where the surgeons attempted to repair his injuries. The legal and moral basis to the Constitution requires that the Courts not judicially abuse the constitutional rights of those Americans to which this country owes its existence.

WHEREFORE, Blough respectfully requests that the defendant appellate court certify to the United States Supreme Court, under the provisions of Title 28 U.S.C. section 1254(2), due to the importance of the questions of law presented, the abuse of judicial authority by the lower Courts, and the constitutional uncertainty of the defendant appellate court's authority to rule upon its own liability in the absence of sovereign immunity.

Respectfully submitted under penalty of perjury this twenty-seventh day of May, 2002.

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that six true and correct copies of the foregoing have been provided via certified mail to Assistant United States Attorney Susan H. Rothstein-Youakim (Suite 3200, 400 N. Tampa Street, Tampa, Fl. 44602) this twenty-seventh day of May, 2002.

"S/Melvin E. Blough" pro se

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO. 02-12177-FF
DISTRICT COURT NO. 8:02-CV-194-T-27

MELVIN E. BLOUGH,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BRIEF OF DEFENDANTS
CIVIL CASE

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DATE: June 26, 2002

Blough v. United States, et al.

Appeal No. 02-12177-FF

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned hereby certifies that the following listed persons and entities have an interest in the outcome of this case:

1. Melvin E. Blough, plaintiff-appelle, pro se;

2. Patricia A. Kerwin, Assistant United States Attorney, district counsel for defendants-appellees;

3. Paul I. Perez, United States Attorney;

4. Tamra Phipps, Assistant United States Attorney, Chief, Appellate Division;

5. The Honorable William H. Rehnquist, Chief Justice of the Supreme Court, defendant-appellee;

6. Susan H. Rothstein-Youakim, Assistant United States Attorney, appellate counsel for defendants -appellees;

7. The Supreme Court of the United States, defendant -appellee;

8. The United States Court of Appeals for the Eleventh Circuit, defendant-appellee;

9. The United States District Court for the Middle

District of Florida, Tampa Division, defendant-appellee; and

10. The Honorable James D. Whittemore, United States District Judge.

STATEMENT REGARDING ORAL ARGUMENT

The United States does not request oral argument.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

The United States certifies that this brief contains 2366 words.

TABLE OF CONTENTS AND TABLE OF CITATIONS

PAGE NO.

TABLE OF CONTENTS

CERTIFICATE OIF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT C-1

STATEMENT REGAPDING ORAL ARGUMENT I

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION I

TABLE OF CONTENTS AND TABLE OF CITATIONS II

TABLE OF CONTENTS II

TABLE OF CITATIONS IV

STATEMENT OF JURISDICTION VII

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 2

A.COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW 2

B. STATEMENT OF THE FACTS 2

C. STATEMENT OF THE STANDARDS OR SCOPE OF REVIEW 4

SUMMARY OF THE ARGUMENT 5

ARGUMENT AND CITATIONS OF AUTHORITY 6

THE DISTRICT COURT DID NOT ERR IN SUA SPONTE DISMISSING BLOUGH'S COMPLAINT WITHOUT NOTICE BECAUSE IT IS PATENTLY OBVIOUS THAT BLOUGH COULD NOT PREVAIL ON THE FACTS ALLEGED AND ALLOWING HIM THE OPPORTUNITY TO AMEND HIS COMPLAINT WOULD HAVE BEEN FUTILE 6

CONCLUSION 13

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

CASES CITED	PAGE NO.
Baltin v. Alaron Trading Corp., 128 F.3d 1466 (11th Cir. 1997)	7
*Bazrowx v. Scott, 136 F.3d 1053 (5th Cir. 1998)	6
*Benson v. O'Brian, 179 F.3d 1014 (6th Cir. 1999)	6
Bivens v. Six Unknown Named Agents Of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971)	5, 10
*Bolin v. Story, 225 F.3d 1234 (11th Cir. 2000)	11
Chute v. Walker, 281 F.3d 314 (1st Cir. 2002)	8
Hrobowski v. Commonwealth Edison Co., 203 F.3d 445 (7th Cir. 2000)	6
Jefferson Fourteenth Associates v. Wometco de Puerto Rico, Inc. 695 F.2d 524 (11th Cir. 1983)	9
Lee v. Hughes, 145 F.3d 1272 (11th Cir. 1998)	10
*McCollum v. Bolger, 794 F.2d 602 (11th Cir. 1986)	10
McGinty v. New York,	

251 F.3d 84 (2nd Cir. 2001) 8

*McKinney v. Oklahoma,
925 F.2d 363 (10th Cir. 1991) 8

Mitchell v. Farcass,
112 F.3d 1483 (11th Cir. 1997) 4

*Omar v. Sea-Land Service, Inc.,
813 F.2d 986 (9th Cir. 1987) 7

*Pierson v. Ray,
386 U.S. 547 (1967) 11

Sec. And Exch. Comm'n v. Chenery Corp.,
318 U.S. 80 (1943) 7

*Shane v. Fauver,
213 F3d 113 (3rd Cir. 2000) 6

Shockley v. Jones,
823 F.2d 1068 (7th Cir. 1987) 8

*Simmons v. Conger,
86 F.3d 1080 (11th Cir. 1996) 11, 12

*Smith v. Boyd,
945 F.2d 1041 (8th Cir. 1991) 7

*Stump v. Sparkman,
435 U.S. 349 (1978) 11, 12

*United States v. Gonzalez-Gonzalez,
257 F.3D (1ST Cir. 2001) 7

STATUTES CITED

28 U.S.C. sec. 1291 viii

28 U.S.C. sec. 1331 viii

28 U.S.C. sec. 1915(e)(2)(B)(i) 5, 6

42 U.S.C. sec. 2000e 2

42 U.S.C. sec. 2000e-5(f) 2

42 U.S.C. sec. 2000e-5(g) 2

RULES CITED

Fed. R. App. P. 4(a) viii

Fed. R. Civ. P. 12(b)(6) 4, 7

STATEMENT OF JURISDICTION

This is an appeal from a final order of the United States District Court for the Middle District of Florida dismissing a civil case allegedly arising under the Constitution and laws of the United States. The district court had jurisdiction pursuant to 28 U.S.C. sec. 1331. The district court entered its order of dismissal om April 15, 2002. Doc. 19. Blough filed a notice of appeal on April 16, 2002. Doc. 21. The notice of appeal was timely. See Fed.r.App.p.4(a). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. sec. 1291.

STATEMENT OF THE ISSUE

WHETHER THE DISTRICT COURT ERRED IN SUA SPONTE DISAMISSING BLOUGH'S COMPLAINT WITHOUT NOTICE ALTHOUGH IT IS PATENTLY OBVIOUS THAT BLOUGH COULD NOT PREVAIL ON THE FACTS ALLEGED AND ALLOWING HIM THE OPPORTUNITY TO AMEND HIS COMPLAINT WOULD HAVE BEEN FUTILE.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

On February 4, 2002, Melvin E. Blough filed a civil complaint against the United States of America; the Supreme Court of the United States; the Honorable William H. Rehnquist, Chief Justice of the Supreme Court; the United States Court of Appeals for the Eleventh Circuit; and the United States District Court for the Middle District of Florida, Tampa Division, alleging that they deprived him of due

process and other constitutional rights and seeking $20,000,000 in damages. Doc. 1. The defendants moved for an extension of time to respond to the complaint, doc. 16, and the district court granted the motion, doc. 18. Before the defendants could respond, however, the district court ordered the complaint dismissed. Doc. 18. This appeal followed.

B. STATEMENT OF THE FACTS.

On June 29, 1998, Blough filed in the United States District Court for the Middle District of Florida a civil complaint against Robert E. Rubin, then-Secretary of the Treasury, seeking relief pursuant to 42 U.S.C. sec. 2000e-5(f) and (g), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e, et seq. Doc. 1-8; Dist. Ct. No. 8:98-cv-1358-T-24E. This case was dismissed after the district court granted a motion for summary judgment in favor of the Secretary on September 16, 1999, and this Court affirmed the district court's judgment on May 9, 2000. Doc. 1-8-9; Appeal No. 99-13735. On August 8, 2000, Blough filed a civil complaint against the United States of America, the United States Department of Treasury, and Lawrence Summers, Secretary of the Treasury, alleging violations of his constitutional rights and purporting to seek relief pursuant to the Fifth Amendment. Doc. 1-9; Dist. Ct. No. 8:00-cv-1631-T-26E. The district court granted summary judgment in favor of the Secretary on res judicata grounds and this Court affirmed. Doc. 1-9; Appeal No. 00-16546. Blough unsuccessfully petitioned the Supreme Court for certiorari. Doc. 1-9; Supreme Court No. 01-203.

I the lengthy complain underlying this appeal, Blough claims, in short, that the courts have deprived him of procedural due process in connection with the

prior litigation, failing to afford him the special consideration due to him as a disabled United States veteran. See doc. 1. In dismissing Blough's complaint, the district court stated,

> Plaintiff's Complaint fails to assert any discernible basis for the relief sought against any named defendant. The Court therefore finds that the action in its present form is frivolous under 28 U.S.C. sec. 1915(e)(2)(B). The petition lacks an arguable basis either in law or in fact and even liberally construed, is based on an indisputably meritless legal theory. Doc. 19.

C. STATEMENT OF THE STANDARD OR SCOPE OF REVIEW.

This Court reviews dismissals under Fed. R. Civ. P. 12(b)(6) de novo, viewing the allegations in the complaint as true. Mitchell v.Farcass, 112 F.3d 1483, 1490 (11th Cir. 1997).

SUMMARY OF THE ARGUMENT

Although the district court should not have dismissed Blough's complaint pursuant to 28 U.S.C. sec. 1915(e)(2)(B)(i), the sua sponte dismissal without notice should be affirmed because it is patently obvious that Blough could not prevail on the facts alleged and allowing him the opportunity to amend his complaint would have been futile. Bivens claims must be brought against federal officials, not the United States, and even if the district court had allowed Blough to amend the complaint to sue the pertinent individual federal officials, those individuals would have been entitled to absolute judicial immunity. Quite simply, no legal grounds exists for Blough to sue the courts just because he does not like their decisions in his cases.

ARGUMENT AND CITATIONS OF AUTHORITY

THE DISTRICT COURT DID NOT ERR IN SUA SPONTE DISMISSING BLOUGH'S COMPLAINT WITHOUT NOTICE BECAUSE IT IS PATENTLY OBVIOUS THA BLOUGH COULD NOT PREVAIL ON THE FACTS ALLEDGED AND ALLOWING HIM THE OPPORTUNITY TO AMEND HIS COMPLAINT WOULD HAVE BEEN FUTILE.

Blough appeals the district court's dismissal of his complaint as frivolous pursuant to 28 U.S.C. sec. 1915(e)(2)(B)(i). Because Blough was not proceeding in forma pauperis, the district court should not have dismissed his complaint pursuant to section 1915(e)(2)B)(i). See Shane v. Fauver, 213 F.3d 113, 116 and n.2 (3d Cir. 2000)(28 U.S.C. sec. 1915(e)(2) inapplicable because plaintiffs were not proceeding in forma pauperis); Benson v. O'Brian, 179 F.3d 1014, 1016 (6th Cir. 1999)(section 1915(e)(2) applies only ti in forma pauperis proceedings); Bazrowx v. Scott, 136 F.3d 1053, 1054 (5th Cir. 1998)("As Appellant was not proceeding in forma pauperis, his complaint could not be dismissed pursuant to sec. 1915(e)(2)." See also Hroboski v. Commonwealth Edison Co., 203 F.3d 445, 448 (7TH Cir. 2000)(district court erred in dismissing plaintiff's complaint pursuant to 28 U.S.C. sec. 1915(e)(2)(A) after it had denied plaintiff's second request to proceed in forma pauperis because plaintiff had lost pauper status). As explained below, however, sua sponte dismissal of the complaint was appropriate pursuant to Fed. R. Civ. P. 12(b)(6). Consequently, the district court's order should be affirmed. See Sec. And Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943) (stating that the decision of a lower court must be affirmed if the result is correct, even though the lower court relied on a wrong ground or gave a wrong reason); Baltin v. Alaron Trading Corp., 128 F.3d 1466, 1473 (11th Cir. 1997) (same).

In very limited circumstances, "[a] trial court may dismiss a claim sua sponte under Fed. R. Civ. P. 12(b)(6) ... Such a dismissal may be made without notice where the claimant cannot possibly win relief." Omar v. Sea-Land Service, Inc., 813 F.2d 986, 991 (9th Cir. 1987) (internal citations omitted); see, e.g., United States v. Gonzalez-Gonzalez, 257 F.3d 31, 37 (1st Cir. 2001) ("If it is crystal clear that the plaintiff cannot

prevail and that amending the complaint would be futile, then a sua sponte dismissal [without notice] may stand .... We will uphold a sua sponte order of dismissal only if the allegations contained in the complaint, taken in the light most favorable to the plaintiff, are patently meritless and beyond all hope of redemption."); Smith v. Boyd, 945 F.2d 1041, 1042-43 (8th Cir. 1991) (district court sua sponte may dismiss complaint under Rule 12(b)(6) so long as dismissal does not precede service of process; although district court should provide pre-dismissal notice, failure top give plaintiff notice and opportunity to respond does not mandate reversal if it is patently obvious that plaintiff could not prevail based on facts alleged in complaint); McKinney v. Oklahoma, 925 F.2d 363, 365 (10th Cir. 1991) (although preferred practice is to accord plaintiff notice and opportunity to amend complaint before acting upon motion to dismiss for failure to state claim, sua sponte dismissal under Rule 12(b)(6) is not reversible error when it is patently obvious that plaintiff could not prevail on the facts alleged and allowing opportunity to amend complaint would be futile); cf. Chute v. Walker, 281 F.3d 314, 318 (1st Cir. 2002) (sua sponte dismissals are erroneous unless parties have been afforded notice and opportunity to amend complaint or otherwise respond, but not every sua sponte dismissal entered without prior notice to plaintiff automatically must be reversed reversal unwarranted if it is "crystal clear" that plaintiff cannot prevail and that amending complaint would be futile); Shockley v. Jones, 823 F.2d 1068, 1073 (7th Cir. 1987) (district court's dismissal of complaint without notice or opportunity to be heard was improper, but reversal unwarranted and remand futile because, even after proposed amendment, complaint fails as matter of law to state claim upon which relief can be granted). But see McGinty v. New York, 251 F.3d 84, 90 (2nd Cir. 2001)

(recognizing that sua sponte dismissal absent notice and an opportunity to be heard can itself be grounds for reversal).

The defendants are mindful of this Court's decision in Jefferson Fourteenth Associates v. Wometco de Puerto Rico, Inc., 695 F.2d 524, 526-27 (11th Cir. 1983), in which this Court reversed a district court's sua sponte dismissal of a complaint for lack of merit without notice, noting that the third-party plaintiff had had no opportunity to develop the facts supporting its claim or to complete its pleadings. Citing cases from other circuits in which complaints had been dismissed for lack of merit, this Court stated, "The rule that emerges ... is that courts exercise their inherent power to dismiss a suit that lacks merit only when the party who brought the case has been given notice and an opportunity to respond." 695 F.2d at 526. This Court further stated, "Even if its claim ultimately has no merit, a party who brings a claim in good faith has a due process right to litigate that claim." Id. at 527.

In this case, however, Blough filed a lengthy complaint setting forth in considerable detail the facts and legal propositions that allegedly supports his claim. See doc. 1. From that complaint, it is patently obvious that Blough's claim does not merely lack merit, but is wholly frivolous and vexatious in that it seeks to punish this and other courts for ruling against Blough in prior litigation. As explained below, Blough's complaint provides no conceivable basis for relief. Consequently, the defendants respectfully submit that Jefferson Fourteenth Associates is inapposite to this case.

Sua sponte dismissal without notice was warranted in this case. In this complaint, Blough,

obviously unhappy with the district court's rulings in his previous cases, this Court's affirmances of those rulings, and the Supreme Court's denial of certiorari, claims that these courts and Justice Rehnquist, apparently in his official capacity, have deprived him of constitutional rights to which he is especially entitled as a veteran and that he is entitled to money damages as a result. See doc. 1. Such a claim is colorable, if at all, only pursuant to Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). See Lee v. Huhes, 145 F.3d 1272, 1275 (11th Cir. 1998) ("[Bivens] held that a plaintiff could state a cause of action and recover money damages against a federal official for constitutional violations occurring under the color of federal law."). Because a state cannot authorize the deprivation of constitutional rights, however, it is axiomatic that "Bivens authorizes suits against individual federal officials, not against the United States." McCollum v. Bolger, 794 F.2d 602, 608 (11th Cir. 1986) (emphasis added).

Even if the district court had granted Blough leave to amend his complaint to sue the pertinent individual federal officials—presumably, many, if not all, of the judges of the district court, this court, and the Supreme Court—Blough still would have been unable to state a claim upon which relief can be granted. It is well settled that judges are entitled to absolute immunity from damages for acts taken in their judicial capacity. See, e.g., Stump v. Sparkman, 435 U.S. 349, 355-57 ((1978); Pierson v. Ray, 386 U.S. 547, 553-54 (1967); Bolin v. Story, 225 F.3d 1234, 1239 (11th Cir. 2000); Simmons v. Conger, 86 F.3d 1080, 1084-85 (11th Cir. 1996). The Supreme Court has recognized the compelling need for this immunity for more than a century. Thus,

> As early as 1872, the Court recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself."

Stump, 435 U.S. at 355 (citing Bradley v. Fisher, 13 Wall. 335, 347 (1872)). This firmly-established doctrine acknowledges that a judge "should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption." Pierson, 386 U.S. at 554. Significantly, "[t]his immunity applies even when the judge's acts are in error, malicious or were in excess of his or her jurisdiction." Bolin, 225F.3d at 1239; accord Stump, 435 U.S. at 355-56.

The Supreme Court has set forth a two-part test for determining whether a judge is entitled to immunity from money damages liability when named as a defendant in a personal-capacity suit. Stump, 435 U.S. at 357, 362. In Simmons, this Court explained the operative analysis as follows:

> The first part of the test is whether the judge dealt with the plaintiff in a judicial capacity. If the judge was not dealing with the plaintiff in a judicial capacity, then there is no immunity. If the judge was dealing with the plaintiff in his judicial capacity, however, the second part of the test is whether the judge acted in the "clear absence of all jurisdiction."

Simmons, 86 F.3d at 1084-85 (internal citations omitted; citing Stump, 435 U.S. at 357). In this case, the judges of the district court, this Court, and the

Supreme Court undeniably were acting in their judicial capacities and within their jurisdiction: the alleged deprivations of which Blough complains all occurred during the pendency of and in direct connection with the legal proceedings arising from Blough's prior litigation.

Consequently, any amendment of Blough's complaint would have been futile. Quite simply, no legal ground exists for Blough to sue the courts just because he does not like their decisions in his cases; he had his days in court, pursued the available avenues of appeal, and, ultimately, like many other litigants, was unsuccessful. Accordingly, the district court correctly dismissed Blough's complaint, and Blough is entitled to no relief on this appeal.

CONCLUSION

The United States respectfully requests that this Court affirm the order of the district court.

Respectfully submitted,

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United States Attorney

TAMRA PHIPPS
Assistant United States Attorney
Chief, Appellate Division

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DATE: June 26, 2002

02-12177-F

IN THE
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

MELVIN E. BLOUGH,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
SUPREME COURT OF THE UNITED STATES,
WILLIAM H. REHNQUIST, CHIEF JUSTICE OF THE SUPREME COURT, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORODA, TAMPA DIVISION.

Defendant(s)-Appellee(s).

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION (D.C. Docket NO. 8:02-CIV-194-T -27TGW)

REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Citations and Authorities	ii-iii
Arguments and Citations of Authority:	
Appellees' Brief	1-3
Sovereign Immunity	3-6
Conclusion	6-7
Certificate of Service	8

TABLE OF CITATIONS AND AUTHORITIES

Cases	Page
Arver v. United States, 245 U.S. 366 (1918)	4
Dent v. State of West Virginia, 129 U.S. 114 (1889)	2
Hamilton v. Kentucky Distillers & Warehouse Co., 251 U.S. 146 (1919)	4
Larson v. Domestic & Foreign Commerce Corporation, 337 U.S. 682 (1949)	3-5
McGinty v. New York, 251 F.3d 84, 90 (2nd Cir. 2001)	3
Mullane v.Central Hanover Bank and Trust Co.,339 U.S. 306, 313 (1950)	2
Neitzke v. Williams, 490 U.S. 319 (1989)	1-3, 6
Securities and Exchange Com. v. Chenery Corp., 317 U.S. 80 (1943)	5-6
United States v. Lee, 106 U.S. 196 (1882)	3-4
United States v. Russell, S.C., 13 Wall., 623-632 (1871)	4

Constitutional Provisions

Article III. Section 2. clause 1		1

Statutes

Title 28 U.S.C.	Section 1915	1-2
	Section 1254(2)	7

Rules

Federal Rules of Civil Procedure:

Rule 12(b)(6)	1-3, 6
Rule 56	3

RESPONSIVE ARGUMENTS AND CITATIONS OF AUTHORITY

APPELLEES' BRIEF

From the onset, it is important to note the abusive scenario which the defendant district court and defendant Government have presented to the defendant appellate court:

> This complaint of constitutional limitation is direct to the Defendants -Appellees (hereafter "Courts"), not for the abuse of judicial discretion; but rather for the intentional abuse of judicial power under Article III. Section 2, clause 1 of the Constitution.

The defendant district court dismissed Plaintiff's -Appellant's (hereafter Blough's) complaint *sua sponte* after "having reviewed the Complaint and being otherwise fully advised in the premises, finds that the action in its present form is frivolous under 28 U.S. C. Section 1915(e)(2)(B). The petition lacks an arguable basis in law or in fact and even liberally construed, is based on an indisputably meritless legal theory. See Neitzke v. Williams, 490 U.S. 319 (1989)." In *Neitzke v. Williams*, supra. the Supreme Court did take judicial notice that the standard for dismissal as *frivolous* under section 1915 differs from the standard of failure to state a claim upon which relief could be granted under Federal Rule of Civil Procedure 12(b)(6). The dismissal by defendant district court was premised upon a full understanding of the complaint and the lawful judicial standard for review based upon *Neitzke v. Williams*, supra. The defendant district court was well aware of its actions.

Blough did address the abusive actions of the defendant district court at page 15 of Appellants Brief:

> "The defendant district court did not address the cause of action asserted in the complaint (Doc 1 at Pg 3-8), the constitutional right asserted (Doc 1 at Pg 3-6), the waiver of sovereign immunity (Doc 1 at Pg 3-6), nor the absence of judicial authority (Doc 20 at Pg 1-3); but rather chose to base its actions solely upon the words *pro se*, frivolous, and meritless as justification for the defendant district court's actions. The defendant district court chose a personal and arbitrary determination of frivolous as the basis for dismissal (Title 28 section 1915(e)(2)(B)(i)); as opposed to the more specific "failure to state a claim upon which relief may be granted" (section 1915(e)(2)(B)(ii)) or "plaintiff seeks monetary relief against a defendant who is immune from such relief" (section 1915(e)(2)(B)(iii)), both of which were identified as indisputably meritless legal theories in *Neitzke v. Williams*, supra. at 329 and both of which were excepted from said classification within Blough's pleadings.
>
> The Order by the defendant district court (Doc 19) ignores the factual contentions within the complaint (Doc 1) which were supported by the Order of the Chief Judge for the district court (Doc 12) and the legal precedent by the Supreme Court providing basis to the instant complaint (*Mullane v. Central Hanover Bank & Trust Co.*, supra.) (Doc 1-Pg 3). The dispositive Order by the defendant district court does <u>again</u> reflect upon "the play and action of

> purely personal and arbitrary power" which is not within the definition of "due process of law". *Dent v. State of West Virginia*, supra. It is constitutionally void for the Courts to substitute themselves for the jury or otherwise rule upon their own liability in the absence of sovereign immunity."

The Order of the defendant district court (Doc 19) does in its silence speak to the continuing judicial abuse; for unlike the district court in *Neitzke v. Williams*, supra., this district court failed to state any reason for finding Blough's complaint frivolous. The reasoning is obvious. The facts within the district court record are indisputable. The Courts have refused to state, for the public record, that totally disabled veterans do not have an inherent constitutional right to procedural due process in complaints of physical injury by the United States Government, that the Courts do have the protection of sovereign immunity in the denial of procedural due process to such a cause of action, and finally, that it is constitutionally void for the Courts to rule upon their own liability in the absence of sovereign immunity.

Defendant Government requests upon appeal that this defendant appellate court step into the shoes of the defendant district court and dismiss the complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The request was necessary as defendant Government admits upon appeal that the defendant district court's dismissal was based upon improper grounds. Defendant Government requests the defendant appellate court to continue abusing Blough's right to procedural due process based solely upon a fleeting statement that the "state cannot authorize the deprivation of constitutional rights" and therefore Blough has failed

to state a claim upon which relief can be granted. Defendant Government further attempts to recaste Blough's complaint as a *Bivens* action. This complaint alleges deprivation by the sovereign; not authorization to deprive. It is this cause of action to which the Courts' have refused to respond .

Dismissals under Fed. R. Civ. P. 12(b)(6) are subject to the summary judgment procedures of Rule 56. The request by the defendant Government amounts to an improper request for *sua sponte* dismissal by the defendant appellate court under Rule 12(b)(6). The defendant Government has not responded to the legal questions presented by Blough at the district or appellate level (see *McGinty v. New York*, 251 F.3d 84, 90 (2nd Cir. 2001). "We have no occasion to pass judgment, however, on the permissible scope, **if any**, of *sua sponte* dismissals under Rule 12(b)(6)". *Neitzke v. Williams*, supra. at 329. It would be an additional abuse of power for the defendant appellate court to honor the request by the defendant Government.

SOVEREIGN IMMUNITY

The defendant Courts' defense (which Blough interprets as a claim of sovereign immunity) is without merit based upon the facts, law and arguments presented within Blough's complaint and appellant brief. Budgetary constraints, heavy caseloads, or other unknown factors do not excuse the Courts' to violate the constitutional rights of a totally disabled veteran. Neither the defendant district court nor defendant Government chose to provide a response to the following legal arguments which were presented in Blough's complaint and at pages 8 - 9 of Appellant's Brief:

"The instant complaint is a claim of constitutional limitation directed to the judicial abuse of Blough's inherent constitutional right to procedural due process by the Courts. As in the case of *United States v. Lee*, 106 U.S. 196 (1882); the instant cause of action "represents a specific application of the constitutional exception to the doctrine of sovereign immunity", *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949).

'Under our system (of government) the people are the sovereign'. *United States v. Lee*, supra. Since the Act of May 8, 1792 the sovereign has honored an implied contract as a nation to protect and provide for those who have borne the burden of war and the Supreme Court has recognized constitutional obligations founded upon the exercise of the war powers clause of the Constitution. *Arver v. United States*, supra; *United States v.Russell*, supra; *Hamilton v. Kentucky Distillers & Warehouse Co., supra.*

The sovereign; which has no greater living obligation than to protect the inherent constitutional rights of totally disabled veterans, is without immunity to this claim of constitutional limitation directed to the judicial power of the Federal courts.

'It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages'. *Larson v.Domestic & Foreign Commerce Corporation*, supra. The Supreme Courts hesitation to entertain suits for

specific relief in *Larson v. Domestic & Foreign Commerce Corporation* is absent in this suit for damages directed to the sovereign.

Blough has made seven affirmative allegations of constitutional limitations upon the Courts' powers and has made claim that the Courts' actions amounted to an unconstitutional taking by the sovereign. This complaint provides a modern example of "a specific application of the constitutional exception to the doctrine of sovereign immunity". *Larson v. Domestic & Foreign Commerce Corporation*, at 696. (Doc 20–Pg 2).

'Under our constitutional system, certain rights are protected against government action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. But in the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event." *Larson v. Domestic & Foreign Commerce Corporation*, supra. (Doc 1-Pg 5).

'The evils which it is suggested may arise from interference of courts with the exercise of powers essential to government, are illusory, and are insignificant in comparison with the proposition that no relief can be granted when it is asserted that the United States has authorized the wrong.' *United States v. Lee*, supra. (Doc 1-Pg 2).

The constitutional exceptions to the doctrine of sovereign immunity would encompass those actions of the sovereign which sicken the heart, soul and conscious of America. Blough came to the Courts in June 1998 as a totally disabled veteran complaining of threats of physical injury in the employ of the Federal Government (Doc 1 at Pg 8 -15). The continuous and abusive response of the Courts has been to summarily ignore the facts and law as presented with the intent to deprive Blough of those due process rights for which he paid dearly in Vietnam. The actions of the sovereign would sicken the heart, soul and conscious of America.

Interference with the actions of the Courts is warranted in that the Courts have committed the wrong. In the case at point, Blough's inherent constitutional rights (guarantees) were created by actions of the sovereign. The sovereign may not seek immunity from violating an obligation of its own making."

To the defendant Government's suggestion that this complaint is a *Bivens* action, Blough submits the following response:

Since the inception of the initial complaint on June 29, 1998; judicial abuse is attributed to no less than six Assistant United States Attorneys, three judges within the defendant district court, eighteen judges within the defendant appellate court, and an unknown number of law clerks who contributed to the Courts' actions. Judicial abstention is attributed to the nine justices of the United States Supreme Court. Liability does not attach to the individual justices, law clerks or attorneys; as the judicial abuse has occurred over an extended period, involves a substantial number

> of individuals with independent status, and is of such continuity as to constitute a systemic action of the sovereign. The Order of March 1, 2002 by the Chief Judge for the district court stands in sharp contrast to the systemic judicial abuse by the Courts' (Doc. 12).
>
> Liability rests with the named defendants' in this constitutional exception to the doctrine of sovereign immunity to which the Supreme Court did allude in *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949).

The defendant Government relies upon *Securities and Exchange Com. v. Chenery Corp.*, 317 U.S. 80 (1943) as justification for affirmation of the defendant district court's dismissal by this defendant appellate court. The Supreme Court did qualify the justification for affirmation in *Securities and Exchange Com. v. Chenery Corp.*, supra. with the following caution:

> "But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury."

It is Blough's position that the United States Constitution, as amended, provides an obligation (inherent constitutional right) to totally disabled veterans which negates the claim of sovereign immunity to the denial of procedural due process by the Courts. Further; it is constitutionally void for the Courts to substitute themselves for the jury or otherwise rule upon their own liability in the absence of sovereign immunity. These are the questions of law to which Blough has requested certification to the

United States Supreme Court. The liability of the Courts for their judicial misconduct (a factual determination) is properly determined *by the people* in trial by jury. It is constitutionally void for this defendant appellate court to rule upon the question of sovereign immunity and thereby serendipitously rule upon its own factual liability.

CONCLUSION

In a democracy, the people will not tolerate a Government which abuses its power and then claims immunity for its actions.

The defendant district court has, in three consecutive suits for damages, deprived Blough of procedural due process by unlawfully creating other grounds for dismissal to avoid addressing the constitutional rights of totally disabled veterans. This defendant appellate court has affirmed the judicial abuse by the defendant district court on two occasions prior to this appeal. The defendant appellate court is reminded of the Supreme Courts caution to dismissals based on "disbelief of a complaint's factual allegations" and hesitation to *sua sponte* dismissals under Rule 12(b)(6), *Neitzke v. Williams*, supra. at 325, 329.

WHEREFORE, Blough respectfully requests that this court honor Blough's pending request for certification to the United States Supreme Court under Title 28 U.S.C. section 1254(2).

Respectfully submitted under penalty of perjury this eight day of July, 2002.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Susan H. Rothstein-Youakim (Suite 3200, 400 North Tampa Street, Tampa, FL. 33602) this eight day of July, 2002.

"S/Melvin E. Blough" pro se

02-12177-F

IN THE
United States Court of Appeals
Eleventh Circuit

MELVIN E. BLOUGH,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA, SUPREME COURT OF THE UNITED STATES, WILLIAM H. REHNQUIST, CHIEF JUSTICE OF THE SUPREME COURT, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORODA, TAMPA DIVISION.

Defendant-Appellee(s).

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION (D.C. Docket NO. 8:02-CIV-194-T-27TGW)

MOTION FOR JUDGMENT

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Citations and Authorities	ii
History and Posture of Litigation	1-2
Conclusion	2
Certificate of Service	3

TABLE OF CITATIONS AND AUTHORITIES

Cases	Page
Hopfmann v. Connolly, 471 U.S. 459, 461 (1985)	2
Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973)	2
State of Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247 (1959)	2
Sunal v. Large, 332 U.S. 174, 181 (1947)	2
United States v. Carver, 260 U.S. 482, 490 (1923)	2

HISTORY AND POSTURE OF THE LITIGATION

On May 27, 2002 Plaintiff's-Appellant's (hereafter Blough's) appeal from the final Order of the defendant district court was filed with the United States Court of Appeals for the Eleventh Circuit requesting certification to the United States Supreme Court under the provisions of Title 28 U.S.C. section 1254(2). Case number 02-12177-F.

On June 7, 2002 Blough petitioned the United States Supreme Court for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit (Case number 01-1798). The dispositive Order by the United States District Court for the Middle District of Florida was presented to the Supreme Court on a writ of certiorari before judgment by this Court of Appeals. Title 28 U.S.C. sections 1254(1), 2101(e) and U.S.SUP.Ct.R. 11.

On June 23, 2002 Blough did petition the United States Court of Appeals for the Eleventh Circuit requesting en banc consideration of certification to the United States Supreme Court under the provisions of Title 28 U.S.C. section 1254(2) in that this defendant Court of Appeals is without judicial authority to rule upon its own liability in the absence of sovereign immunity.

On June 26, 2002 Defendants'-Appellees' Brief was filed with the United States Court of Appeals for the Eleventh Circuit. The brief states that "because Blough was not proceeding in forma pauperis, the district court should not have dismissed his complaint pursuant to section 1915(e)(2)(B)(i)". Defendant Government requests that this defendant appellate court step into the shoes of the defendant district court and dismiss Blough's complaint under Fed. R.

Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. For purposes of the request for summary judgment by this appellate court; defendant Government has conceded the factual assertion that Blough (a totally and permanently disabled veteran) was intentionally denied procedural due process by the defendant Courts in a prior claim of constitutional tort against defendant Government. It is defendant Governments' summary judgment position that the defendant Courts have no Constitutional liability for the intentional deprivation of that specific procedural due process to which defendant Government admits. Bloughs response to the defendant Governments position is summarily stated at the conclusion of Appellant's Reply Brief of July 8, 2002: "In a democracy, the people will not tolerate a Government which abuses its power and then claims immunity for its actions". The United States Constitution applies a zero tolerance level to the abuse of totally disabled veterans by the United States Government.

On October 7, 2002 the Supreme Court of the United States did deny Blough's petition for writ of certiorari **before judgment** by this appellate court (copy of Order attached).

CONCLUSION

The United States Supreme Court has declared over and over again that its denial of certiorari does not import any expression of views by the Court concerning the merits of the case or whether the case was correctly decided below. *United States v. Carver*, 260 U.S. 482, 490 (1923); *Sunal v. Large*, 332 U.S. 174, 181 (1947); *State of Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Hopfmann v. Connolly*, 471 U.S. 459, 461 (1985).

The Supreme Court did take judicial notice **before judgment** and render moot Blough's request of this court under Title 28 U.S.C. section 1254(2).

WHEREFORE, Based upon the malicious judicial conduct of the defendant district court and defendant Government's request to further abuse the judicial process; Blough respectfully requests that this appellate court accept the charge presented to the Supreme Court in the petition for writ of certiorari by vacating the Order of the district court and remanding the case with proper instruction and positive resolution to the three questions of law presented.

Submitted under penalty of perjury this thirteenth day of October, 2002.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Susan H. Rothstein-Youakim (Suite 3200, 400 North Tampa Street, Tampa, FL. 33602) this thirteenth day of October, 2002.

"S/Melvin E. Blough" pro se

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-12177-FF

FILED
NOV 21 2002
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

THOMAS K. KAHN
CLERK

MELVIN E. BLOUGH,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
U. S. SUPREME COURT,
ET AL .,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

---

BEFORE: ANDERSON, DUBINA and WILSON, Circuit Judges.

BY THE COURT:

Appellant's "motion for judgment" is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
2002
THOMAS K. KAHN
CLERK

No. 02-12177-FF

MELVIN E. BLOUGH,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
U.S. SUPREME COURT,
WILLIAM H. REHNQUIST, Chief
Justice of the Supreme Court,
U.S. COURT OF APPEALS, for the
Eleventh Circuit,
U.S. DISTRICT COURT MIDDLE
DISTRICT OF FLORIDA,
Tampa Division,

Defendants-Appellees.

On Petition for Hearing En Banc from the United States District Court for the Middle District of Florida

---

BEFORE: ANDERSON, DUBINA and WILSON, Circuit Judges.

No Judge in regular service on the Court having requested that the Court be polled on hearing en banc (Rule 35, Federal Rules of Appellate Procedure;

Eleventh Circuit Rule 35-5), the Petition for Hearing En Banc is DENIED.

ENTERED FOR THE COURT:

"S/Charles R. Wilson"
UNITED STATES CIRCUIT JUDGE

DEPARTMENT OF VETERANS AFFAIRS
Regional Office
PO Box 1437
St Petersburg FL 33731-1437

March 19, 1997

In Reply Refer To:
317/271C-7935
C 25 707 037

Mr. Melvin Blough
803 Tomahawk Trail
Brandon FL 33511

Dear Mr. Blough:

The following certification is furnished for use in determining entitlement to Civil Service Preference for the spouse of a service connected disabled veteran.

This is to certify that the records of the U.S. Department of Veterans Affairs (VA) disclose that Melvin Blough enlisted September 25, 1968, was separated August 31, 1971, from the Armed Forces of the United States and has an existing service connected disability. The percentage and nature of the service connected disability is shown below:

PERCENT	DISABILITY
100%	Amputation, below knee, bilateral
60%	Wound, left upper extremity with fractures of metacarpals and incomplete paralysis, left median nerve, with complete paralysis, left

	ulnar nerve.
30%	Splenectomy
30%	Recurrent urethral condylomata with urethral stricture, p.o.
20%	Wound, pelvic girdle, mg XV
10%	Laceration, external cutaneous nerve, right thigh
10%	Wound, abdomen with laceration of liver

100 percent Combined Percentage

The veteran is not currently rated as unemployable due to service connected disabilities. The veteran is permanently and totally disabled.

Sincerely yours,

"S/Bill Bryant"
BILL BRYANT
Veterans Services Officer

271C/